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No. _____

In The
Supreme Court of the United States
October Term, 1995

ANTHONY D. LIBERATORE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ of Certiorari To The
United States Court of Appeals
For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the standard for competency for purposes of the sentencing phase of a federal criminal prosecution lower than the standard for competency for purposes of the pretrial and trial phases of the prosecution?
2. Do the Fifth and Sixth Amendments require the grant of a new trial on grounds of newly discovered evidence that the accused was incompetent at the time of trial and his counsel were ineffective in failing to raise or discover the issue, when a timely motion for that relief was made prior to sentencing and, upon hearing of that motion, the only evidence presented concerning the accused's condition at the time of trial was that he suffered from an organic brain disease which seriously impaired his ability to understand the nature of the proceedings and to assist in his defense?

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PETITION FOR A WRIT OF CERTIORARI

Anthony D. Liberatore, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on July 28, 1995.

OPINIONS BELOW

The opinion of the Court of Appeals is set forth at A. 1a.[1] The District Court's March 21, 1994, judgment of conviction is set forth at A. 11a. The District Court's June 27, 1994 Order denying a new trial on grounds of newly discovered evidence is set forth at A. 19a and published at United States v. Anthony D. Liberatore, 856 F. Supp. 358 (N.D. Ohio 1994). The District Court's March 10, 1994 Order denying a finding of incompetency for purposes of sentencing is set forth at A. 45a and published at United States v. Anthony D. Liberatore, 846 F. Supp. 569 (N.D. Ohio 1994).

JURISDICTION

The opinion of the Court of Appeals for the Sixth Circuit was entered on July 28, 1995. A. 1a. The Court of Appeals jurisdiction was invoked pursuant to 28 U.S.C. § 1291. This

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[1] References to "A" are to the appendix to this petition. References to "TR" are to the trial transcript. References to "TA" or "TB" are to transcripts of the competency hearing held on 2/11/94 and 2/15/94, respectively. References to "R" are to other items in the record on appeal.

Court has jurisdiction to review the judgment of a court of appeals entered in this criminal case by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth and Sixth Amendments to the United States Constitution and pertinent provisions of Title 18 U.S.C. §§ 4241, 4246 and 4247 are reprinted at A. 83a - A. 90a.

STATEMENT OF THE CASE

Introduction

Petitioner Anthony D. Liberatore is a 74 year old man who suffers from a debilitating, degenerative organic brain disease, dementia of the Alzheimer's type, as well as a host of other ailments including hearing loss, heart disease and lung cancer. By all accounts, Mr. Liberatore has a loving family as well as numerous friends, acquaintances and erstwhile associates who came to know and respect him during the many years he served as an officer of a local laborers' union. Much of the rest of petitioner's history is mired in controversy. Over the years, he has defended against varied and serious charges of criminal wrongdoing--ultimately being found guilty of some and exonerated of others. He has been incarcerated for extended periods of time, paroled and pardoned.

In the case at bar, Mr. Liberatore was charged with

participating in money laundering and prohibited labor transactions and with doing so in furtherance of an alliance between organized crime and organized labor. Many of the acts attributed to him allegedly occurred while he was incarcerated on a previous conviction. Ultimately, a jury found him guilty and he was convicted of violating 18 U.S.C. §§ 1962(c) and (d), 1956(a) and 371 and 29 U.S.C. §§ 186(b)(1) and (d)(2). Soon after the verdict and prior to sentencing, petitioner was diagnosed as suffering from Alzheimer's-type dementia and this circumstance was presented to the district court as a bar to sentencing and, together with his trial counsels' ineffectiveness for failing to discover or raise the issue, as grounds for a new trial. Initially, the district court found sufficient indicia of incompetency to halt the proceedings, but ultimately it issued two lengthy opinions denying petitioner any relief. The court of appeals, in a brief, per curiam opinion, affirmed the district court.

Facts

On June 25, 1992, petitioner Anthony D. Liberatore was charged along with his brother, Chester Liberatore, and Dominic Olivio in a 12 count indictment.[2] Initially, Mr. Liberatore's lead counsel was Elmer Giuliani. About 8 weeks

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[2] Chester Liberatore and Dominic Olivio entered plea agreements prior to trial.

prior to trial, Elmer began to experience some health problems of his own and his son Albert Giuliani replaced him. (TA 17, 54). As Elmer was, Albert Giuliani was assisted by attorney Robert Dixon. (TA 23). Because of Elmer's familiarity with the client and the case, however, he remained a part of the defense team. (TA 55).

The case was tried in early June of 1993. Evidence was taken over the course of 7 days, generally from 8:00 am. to 5:00 p.m., with a 15-minute break in the morning, an hour for lunch and a 15-minute break in the afternoon. (R. 11, 118-121, 123 Minutes; TA 28, 29). The government's proof consisted largely of the testimony of investigating agents and a small bevy of professional witnesses and alleged co-conspirators. The government also relied heavily on excerpts of numerous monitored prison phone calls, intercepted prison visiting room conversations, and other intercepted conversations which the government played for the jury and interpreted through prosecution witnesses. The bulk of the tapes were played during the last 3 days of trial. (E.g. TR 590-624, 742-875 (Personen)). The jury found Mr. Liberatore guilty on all counts, and he was remanded into custody pending sentencing which was scheduled for mid-August, 1993. (R. 114, Minutes).

As the date of sentencing approached, new counsel were retained for purposes of appeal, and they began to make

inquiries about the status of the case. Their encounters with Mr. Liberatore and reports of his behavior raised concerns about Mr. Liberatore's mental status, and on August 17, 1993, when it became apparent that procedural obstacles would not permit his being evaluated by an expert prior to sentencing, appellate counsel entered their appearance and requested a continuance of sentencing so as to permit the needed examination. (R. 150 Motion). The court denied this motion. (R. 151 Order).

Motion to Determine Competency

The defense, thereafter, gathered supporting materials and requested a hearing, pursuant to 18 U.S.C. § 4241, on the issue of Mr. Liberatore's competency and again requested that he be permitted access to an expert of the defense's choosing. (R. 153 Motion). The motion was supported by affidavits of Messrs. Giuliani, Mr. Liberatore's son, Anthony Liberatore, Jr., and Mr. Liberatore's ex-wife, Margaret Neil--all of whom attested to their recent observations of marked deficiencies in Mr. Liberatore's mental abilities. (R. 153 Motion).

Albert Giuliani advised the court that Mr. Liberatore had exhibited the following problems at trial.

> Throughout the trial the defendant was of limited or no assistance to the defense. At first, I attributed this inability on defendant's part to his age, limited education and generally poor health as well as the

> rapid, fatiguing pace of trial. However, by the end of trial and particularly during the last two days of trial, defendant's condition deteriorated dramatically to the point that, in hindsight, I now question whether he was competent to receive the jury's verdict: he repeatedly made wholly inappropriate comments, rambled and was unable to focus his attention on the serious matters at hand or to respond normally to my questions. (R. 153 Aff. of Albert Giuliani).

Albert Giuliani further alerted the court that Mr. Liberatore had exhibited the following problems after petitioner was found guilty and incarcerated:

> Since the jury's verdict, I have attempted to communicate with the defendant on at least eight separate occasions for purposes of preparing for his sentencing, but have had only one partially meaningful conversation with him. On all other occasions, the defendant has been incoherent and, as such, has been unable to assist in preparing objections to the presentence report or compiling mitigating information and, indeed, has seemed oblivious to the harsh reality that he has been found guilty and risks being sentenced to a significant term of imprisonment. (R. 153 Aff. of Albert Giuliani).

Similarly, Elmer Giuliani attested to his post-verdict observations of Mr. Liberatore:

> I have had occasion to speak with the defendant on numerous occasions since the return of the verdict in this case and firmly believe that he does not recall the subjects of previous conversations and cannot articulate what transpired during the last days of trial. Further, he does not fully comprehend the charges of which he has been found guilty or

> the issues relating to his impending sentencing, including those issues raised by the presentence report--despite numerous attempts to explain those charges and sentencing issues to him. The defendant presently is incapable of focusing his thoughts or effectively communicating his thoughts so as to assist in his defense during the sentencing phase of this prosecution. (R. 153 Aff. of Elmer Giuliani).

In consideration of the § 4241 motion and upon consultation with the counsel for the government, the court transferred Mr. Liberatore to the Federal Medical Center in Springfield, Missouri for 30 days of evaluation, and continued the matter with its assurances that Mr. Liberatore would be permitted access to a defense expert at some later date. (R. 154, R. 222 at 16-18; R. 156 Order).

Dr. Robert L. Denney's Report of Mr. Liberatore's 30-Day Evaluation at the Federal Medical Center

During the 30-day period that Mr. Liberatore was evaluated at the Springfield Medical Center he was regularly observed by clinical and correctional staff. The evaluation team, which was headed by Dr. Robert L. Denney, obtained Mr. Liberatore's medical history and performed a physical exam, an internal medical consultation and a neurological evaluation, including a neurological exam, CT scans of his brain and an electroencephalogram study. The evaluation team also administered a battery of psychological and neuropsychological tests. (R. 225, Rep. of Denney at 1-2). As

stated in Dr. Denney's Report, all the medical information, objective tests and observations of Mr. Liberatore's behavior compelled the conclusion that he suffered from dementia of the Alzheimer's type and was presently incompetent:

> [The Diagnosis]
> * * * *
> Given the available clinical evidence, the most probable diagnosis for Mr. Liberatore is Primary Degenerative Dementia of the Alzheimer type, Senile Onset. (Id. at 6-7).
>
> [Opinion as to Competency]
> * * * *
> [Mr. Liberatore's] inability to accurately remember verbal information, create concepts, understand relationship, and follow complex lines of reasoning, severely hinder his ability to participate in his defense.
>
> His current mental condition impacts his ability to participate in legal proceedings in several ways. He will have difficulty following lines of reasoning when discussing his defense with counsel. He will have difficulty remembering what occurred during previous discussions. He may very well have difficulty recalling events to accurately assess merits of the Presentence Report. In addition, his memory impairment would hinder his ability to testify on his own behalf. Lastly, his mental condition and orientation will fluctuate to some degree on a daily basis, such that it would be impossible to predict when he would be his best. Although Mr. Liberatore appears to be an intellectually capable individual during brief conversations, in-depth questions and discussion reveal serious impairments.

> In this evaluator's opinion, Mr. Liberatore suffers from a mental disease or defect rendering him mentally incompetent to the extent he is unable to understand the nature and consequences of the proceedings against him or assist properly in his defense. (Id. at 8) (emphasis added).

Subsequent Proceedings

Subsequent to the receipt of Dr. Denney's report, the court scheduled a hearing on the issue of Mr. Liberatore's competency for purposes of sentencing, granted the defense's request that Mr. Liberatore be examined by Dr. Charles A. deLeon and remarkably, *sua sponte*, directed that Mr. Liberatore be examined by yet another court-appointed expert, Dr. Kurt Bertschinger (R. 216 at 6, 7; R. 173 and 171 Orders).

The defense also advised the court, via memorandum, letter, and finally, a motion for new trial filed on January 12, 1994, which asserted that newly discovered evidence compelled the conclusion that Mr. Liberatore was incompetent as of the time of trial and that his trial counsel were ineffective in failing to discover or raise the issue, that the scope of the court's inquiry properly encompassed the issue of Mr. Liberatore's competency for trial purposes as well as sentencing, and urged the court to consolidate its consideration of the issues. (R. 193, 194 attachments to Motion to Cont. Sent.; R. 172 Motion for New Trial). In this regard, the defense specifically advised the court that Dr. Denney had

confirmed that, prior to the upcoming hearing, he could perform an evaluation of Mr. Liberatore's competency as of the time of trial, and the defense urged the court to order Dr. Denney to perform the retrospective evaluation. The court, however, was of the view that the issue of competency for purposes of sentencing, which it later termed "contemporaneous competency" and the issue of competency at trial, which it later termed "retrospective competency" ought to be treated separately. See, e.g., A. 26a. The court never requested Dr. Denney, Dr. Bertschinger or anyone to perform a retrospective evaluation. Nor did the court instruct Dr. Bertschinger as to what standard should be applied in assessing Mr. Liberatore's competency.

Reports of the Defense Expert, Dr. Charles A. deLeon, and the Court's New Expert, Dr. Kurt A. Bertschinger

After each had separately interviewed petitioner for 1-2 hours and had him perform some additional tests, Drs. deLeon and Bertschinger both concurred with Dr. Denney in his diagnosis of Mr. Liberatore's dementia. Dr. Bertschinger, without articulating what standard for legal competency he employed, concluded that "in spite of the organic picture [Mr. Liberatore] [was] competent to participate in the sentencing process." (R. 225, Rep. of Bertschinger at 4). Dr. deLeon not only concurred with Dr. Denney that Mr. Liberatore's Alzheimer's-type dementia

rendered him incompetent for purposes of sentencing but also concluded, retrospectively, that Mr. Liberatore was incompetent as of the time of trial. (TB 109, 114, 118; Rep. of deLeon at 3).

Hearing on the Issue of Mr. Liberatore's Competency

At hearing on the issue of defendant's competency, all three experts, Dr. Denney, Dr. deLeon and Dr. Bertschinger, testified as did Elmer and Albert Giuliani and AUSA James R. Wooley, FBI agent Gerald Personen and Probation Officer Carl E. Glotz.[3] The government also introduced a total of 27 tapes of Mr. Liberatore's phone conversations which were recorded while he underwent his evaluation at Springfield. (TB 207).[4] Though the court at first precluded examination

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[3] Mr. Wooley's testimony was largely related as to post-verdict plea negotiations with Elmer Giuliani. (TA 64-67 (E. Giuliani); TB 216-223 (Wooley)). Agent Personen's testimony primarily concerned authenticating the tapes of Mr. Liberatore's monitored conversations and interpreting what was being discussed; and, in this regard, he confirmed that he too noticed moments of confusion and that the 6 tapes selected by the government were the only ones containing references to Mr. Liberatore's recent prosecution. (TB 166, 203, 204). Probation Officer Glotz's testimony was limited to confirming that Mr. Liberatore had submitted a statement that his case was being appealed and had told Mr. Glotz that "all he did was make telephone calls." (TB 212, 213).

[4] Specifically, the government selected 6 tapes to be played at hearing. (e.g. TB 203). The defense also requested that one other of the 27 tapes be played for the court's consideration. (TB 205, 206). Dr. Denney and Dr. deLeon each had an opportunity to listen to and review transcripts of the 6 tapes selected by the government

on the issue (TA 109), the court ultimately allowed expert testimony on the issue of Mr. Liberatore's competency as of the time of trial, including the retrospective evaluation of Mr. Liberatore which the defense's expert had performed, because the government opened the door by way of its questioning of the witnesses. (e.g., TA 142; TB 52; TB 117, 118).

Testimony of Attorneys at Hearing

Albert and Elmer Giuliani, recounting specific examples of Mr. Liberatore's problems with recall, comprehension and communication, confirmed the substance of their affidavits and concluded unequivocally that Mr. Liberatore was of no assistance to his defense pretrial, at trial or post-verdict. (See, e.g. TA 18-28, 32, 34, 39, 50-52, 60-62). Indeed, Albert Giuliani testified that not only was Mr. Liberatore of no assistance at trial, but Albert never explored, in light of the government's evidence, whether Mr. Liberatore should take the stand in his own defense; and, this omission was due, in part, because in Albert's view, Mr. Liberatore was mentally incapable of doing so. (TA 50-52).

Albert also listed what he usually expected of clients in preparing for sentencing -- an ability or capacity to recall events of trial and discuss post-verdict motions, recall trial evidence and assist in reviewing the pre-sentence report,

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as well as the additional tape selected by the defense. (TA 103; TB 111). Dr. Bertschinger reviewed some of the transcripts. (TB 18).

obtain a rudimentary understanding of factors considered in sentencing, recall and communicate any mitigating evidence about life, history and the circumstances of the offenses, understand enough about charges and evidence so as to consider accepting responsibility, and discuss the right of allocution and what might be said. (TA 35-38, 39). And, he unequivocally concluded that Mr. Liberatore did not and was not able to assist in any of these common tasks. (TA 32, 34, 38, 39).

Testimony of Experts

All three experts concurred that Mr. Liberatore suffered, as of September 1993, from primary degenerative dementia of the Alzheimer's type, senile onset--an insidious, gradual and inexorably worsening organic brain disease which denotes significant impairment in social and occupational ability even in its mildest form. (TA 102, 110; TB 16, 20, 22-23, 52, 88, 89; TB 109). Further, all experts agreed that the tape recorded conversations involving Mr. Liberatore did not change their diagnosis (or opinion as to competency) in that they all noted that Mr. Liberatore exhibited fluctuating levels of lucidity and confusion during the conversations, which were entirely consistent with their own observations of Mr. Liberatore and their diagnosis that he suffered from Alzheimer's-type dementia. (TA 103-104, 145; TB 18, 24-35, 40; TB 111-114). When asked specifically about the type of

input which Mr. Giuliani previously stated he expected of a defendant in preparing for sentencing, each expert agreed that Mr. Liberatore's ability to render such assistance would be impaired by his condition. (TA 105-108, 156; TB 37, 40; TB 115-16). Further, the experts agreed that to the extent Mr. Liberatore might be able to perform better on some days or at various times during the day, it was impossible to predict with any assurance when those optimum times would appear or that any progress made during such an interlude would survive his next bout of confusion. (TA 114, 155; TB 55, 56).

Expert Opinions as to Competency for Purposes of Sentencing

Drs. Denney and deLeon maintained their opinions of incompetency, as stated in their respective reports, upon their mutual assumption that sentencing was an important phase of prosecution which required more of a defendant than simply an awareness that he had been through a trial, had been found guilty and was about to be punished. (TA 105, TA 114-115; TB 115, 116). For his part, Dr. Bertschinger never provided an unqualified opinion as to Mr. Liberatore's competency; for, he was uncertain of both the applicable legal standard and the extent of a defendant's participation during the sentencing phase of a federal prosecution. (TB 40-42, 44).

Expert Opinions as to Competency as of the Time of Trial

All experts agreed that the course of the disease which inflicted Mr. Liberatore compelled the conclusion that he suffered from its effects (to some degree) as of the time of trial. (TA 112, 113; TB 52; TB 117). And the experts agreed that a retrospective determination of Mr. Liberatore's competency was possible and that such an evaluation would entail interviewing persons who knew and had an opportunity to observe him during the time of trial. (TA 110-111; TB at 51; R. 225, Rep. of Bertschinger at 4; TB 118-119). For his part, in consideration of all the information known to him, including the testimony of Messrs. Giuliani, the affidavits submitted in support of Mr. Liberatore's motion, his personal interviews with Mr. Liberatore's son and ex-wife, and the Dusky test for competency, Dr. deLeon testified that in his opinion Mr. Liberatore's condition rendered him incompetent to stand trial in June of 1993. (TB 118-119). Neither of the other experts disagreed with Dr. deLeon. Rather, each indicated, as Dr. Denney expressly concluded, that a serious question existed as to whether Mr. Liberatore was legally competent for purposes of trial in June of 1993. (TA 142; TB 51-52).

Rulings as to Competency for Purposes of Sentencing

In finding petitioner competent for purposes of sentencing the district court expressed a dim and narrow view of

what was expected of an accused.[5] A. 45a-82a.

In this vein, contrary to the defense's contention that the test that this Court announced in Dusky v. United States, 362 U.S. 402 (1960), was fully applicable, the district court embraced the notion that less competency was required for purposes of sentencing than for purposes of trial and determined to measure Mr. Liberatore's competency under the following standard:

> [W]hether the defendant understands the nature of the sentencing proceeding and can offer the kind of rational assistance expected of a federal defendant in conjunction with the sentencing phase of his prosecution. A. 50a.

In applying its test, the court found no need to consider the accused's ability to rationally and meaningfully discuss issues related to the district court's rulings at trial, issues related to appeal, bond pending sentencing and appeal, and grounds for seeking a new trial. A. 65a. And, it minimized the degree of competency necessary to exercise the right of allocution, A. 64a, 67a, as well as the need for an unimpaired memory in the context of sentencing, inasmuch as petitioner's well-chronicled criminal history made it possible for counsel to reconstruct the accused's relevant conduct and

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[5] Subsequently, on March 21, 1994, the court overruled all defense objections and sentenced Mr. Liberatore to a total of 120 months, the highest end of the guideline range recommended by the probation department. (A. 11a; R. 199 at 38).

criminal history. A. 68a.

The defense argued to the court of appeals that the district court erred in finding petitioner competent for purposes of sentencing because it applied a standard that was significantly less protective of Mr. Liberatore's rights than the standard that this Court in Dusky found to be a constitutional minimum and that incorrectly minimized and denigrated the extent to which he was entitled to participate during the sentencing phase of his prosecution.

The court of appeals in less than a page of a seven page *per curiam* opinion summarily rejected petitioner's arguments. A single sentence was written to dispense with petitioner's arguments concerning the proper standard of competency in the post-verdict proceedings:

> And although the district court's opinion might be read as proposing a somewhat less stringent standard for determining competency for sentencing than would be required for determining competency for the pre-trial and trial phases of a criminal proceeding, it is clear that the standard that the district court applied in coming to its conclusion is essentially that required by Dusky v. United States, 362 U.S. 402 (1966).

A. 4a-5a. With equal dispatch, the court of appeals summarily concluded that the district court's finding of competence was "supported by substantial evidence" and thus could not be overturned as clearly erroneous. A. 4a.

Rulings as to Motion for a New Trial

The district court's denial of petitioner's motion for new trial followed its consideration of the record previously established at hearing on the issue of his contemporaneous competency, and further argument of counsel. A. 23a.

The district court did not cite one iota of evidence in support of its conclusion that Mr. Liberatore had been competent to stand trial. Rather, the court faulted petitioner for raising the issue post-verdict and for not supplementing the record with testimony from Mr. Giuliani's associate, Mr. Dixon, or with further retrospective evaluations. A. 26a, 28a, 35a. The court neither accepted nor rejected the experts' opinions that Mr. Liberatore suffered from Alzheimer's-type dementia at the time of trial. Rather, the court skirted the issue entirely by adopting the position that the expert testimony "only alert[ed] the court to the presence of a condition without addressing the critical question of how severe that condition was during the relevant time period," A. 25a; and, thus, the court wholly ignored the objective diagnostic criteria which must be met before an individual is diagnosed as suffering from Alzheimer's-type dementia disease and in particular that even in its mildest form the disease denotes significant impairment in social and occupational activities. (See e.g., TB 24-28). The court also wholly discounted the unrebutted, uncontroverted testimony

of Dr. deLeon, the only expert who performed a retrospective evaluation, in part, because Dr. deLeon applied too "rigorous" of a test for competency and, in part, because he considered observations made by Mr. Liberatore's family and trial counsel. A. 31a.[6] And finally, the district court discounted all observations of Mr. Liberatore's impaired condition by his trial counsel and his family, A. 31a, 34a, 42a, despite the fact that all experts agreed that a recounting of his behavior by persons who knew him was precisely what they required to make a retrospective evaluation and despite the fact that this Court itself has recognized that defense counsel may be the best source of such information. Medina v. California, 505 U.S. ___, 112 S. Ct. 2572, 2580 (1992).

Having found that Mr. Liberatore was competent as of the time of trial, the court similarly rejected petitioner's argument that his right to participate fully at his trial had not been zealously guarded--for, in the court's view trial counsels' performance had not fallen below an objectively reasonable standard because, "while defendant probably suffer[ed] from a mental disease, the disease is of unknown severity and, at the time of trial, may not have affected defendant's competency in a legally significant way." A. 43a.

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[6] Dr. deLeon applied the test prescribed by § 4241, as clarified by Dusky, and thereunder determined that Mr. Liberatore's dementia and particularly his inability to abstract rendered him incompetent. (TB 115, 147, 148, 150).

(Emphasis added).

In the court of appeals, the defense argued that the district court erred in denying Petitioner a new trial upon the newly discovered evidence that his dementia rendered him incompetent for purposes of trial within the meaning of § 4241 and Dusky, supra, and that his trial counsels' performance was constitutionally deficient in failing to recognize and raise the issue of that incompetence prior to or during trial. The court of appeals, again, in less than a page, summarily affirmed the district court, finding that its conclusions were "well supported by the record." A. 5a.

REASONS FOR GRANTING WRIT

I. An Important Question Exists As To Whether The Standard For Competency During The Sentencing Phase Of A Federal Prosecution Is Lower Than The Standard Of Competency During The Trial And Pretrial Phases Of The Prosecution.

When all was said and done, the district court's finding that petitioner was competent for purposes of sentencing turned on its conclusions of law, not fact. No one disputed that the accused was presently mentally impaired. Rather, the issue became what was the proper measure of an accused's competency to participate in the sentencing phase of a federal prosecution--the Dusky test or some lesser test. A wealth of precedent favors the application of the former. With its affirmance of the district court, the Sixth Circuit has

approved the application of the latter. A. 4a-5a.

This Court has long recognized that the dictates of due process and the right of an accused to a fair trial and effective assistance of trial under the Fifth and Sixth Amendments preclude the conviction of an incompetent. See Pate v. Robinson, 383 U.S. 375 (1966); Drope v. Missouri, 420 U.S. 162 (1962); Riggins v. Nevada, ___ U.S. ___, 112 S. Ct. 1810 (1992) (Kennedy, J. concurring); Medina v. California, 505 U.S. ___, 112 S. Ct. 2572 (1992). These fundamental precepts are not satisfied merely because a defendant exhibits a general awareness of his circumstances and surroundings; rather, the time-honored, constitutionally mandated test for competence, which is to be applied in all federal and state criminal proceedings, expressly recognizes and provides:

> it is not enough for the district judge to find that "the defendant [is] oriented to time and place and [has] some recollection of events," ... the "test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding--and whether he has a rational as well as factual understanding of the proceedings against him." Dusky v. United States, 362 U.S. 402 (1960)(emphasis added).

See also Godinez v. Moran, 509 U.S. ___, 113 S.Ct. 2680, 2686 (1993); Medina, supra, at 112 S. Ct. at 2579; see also; United States v. Pellerito, 878 F.2d 1535, 1545 (1st Cir. 1989), cert. denied, ___ U.S. ___, 112 S. Ct. 184 (1991);

Lafferty v. Cook, 949 F.2d 1546, 1550 (10th Cir. 1991), cert. denied, 112 S. Ct. 1942 (1992); Lagway v. Dallman, 806 F.Supp. 1322, 1333 (N.D. Ohio 1992); see also 18 U.S.C. § 4241.

In the context of federal criminal proceedings, Congress has not only codified the Dusky test, but has expressly prescribed that the same test be applied throughout federal criminal proceedings, i.e., pretrial, during trial and post-verdict--if "at any time after the commencement of a prosecution for an offense and prior to the sentencing of the defendant," the defendant is shown to be "suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense," then the proceedings shall cease until his competency is restored. 18 U.S.C. § 4241(a), (d), (emphasis added); See also §§ 4246 and § 4247(b) and (c).

Though this Court has not specifically addressed the issue of whether Dusky applies to the sentencing phase of a prosecution, in Godinez, supra, 113 S. Ct. 2680, this Court recently reaffirmed the constitutional imperative that an accused be competent throughout a criminal proceeding and expressly held that the Dusky test applied pretrial as well as during trial. Id. at 2686, 2688; id. at 2688-2691 (Kennedy J., concurring).

Clearly, if the dictates of § 4241 *et seq.* and its constitutional underpinnings are to be satisfied, then the accused's competency to participate in the sentencing phase of a prosecution must also be measured under the Dusky test precisely because the constitutional "need for competency survives trial and extends through the sentencing phase of a criminal proceeding." Pellerito, 878 F.2d at 1544; see also United States v. Soldevillia-Lopez, 17 F.3d 480, 489 (1st Cir. 1994); United States v. Renfroe, 825 F.2d 763 (3d Cir. 1987); United States v. Saban-Gutierrez, 783 F. Supp. 1538 (D. Puerto Rico, 1991) aff'd, 961 F.2d 1565 (1st Cir. 1992) (table); Cf. Hays v. Arave, 977 F.2d 475, 480 (9th Cir. 1992) (sentencing defendant in abstentia constituted structural error).

Here, however, the district court failed to heed the natural conclusion that follows from the foregoing decisions of this Court as well as the plain language of 18 U.S.C. § 4241 and the decisions of other federal courts which followed and applied that precedent, to wit: the *Dusky* test for competency applies in federal prosecutions from the time of arraignment and through the time of sentencing.

Instead, in keeping with its previous determination to treat the issue of the accused's competency to face sentencing separately from the issue of the accused's competency to stand trial, the court took great pains to demonstrate why

the Dusky test did not apply with full force and effect in the context of sentencing. To that end, the court embraced a minority line of pre-Godinez Ninth Circuit cases, the very kind of cases disapproved in Godinez, for the proposition that differing degrees of competency were required to participate at varying stages of a prosecution. A. 49a. To that end, the court proceeded to explain why the nature of sentencing proceedings required less participation and thus less competency than was required for purposes of trial, e.g. A. 64a-69a. To that end, the court dismissed all the testimony of petitioner's trial counsel as biased or only marginally relevant, A. 50a, 61a, and rejected the opinion of the two experts who applied the competency test prescribed in § 4241 in favor of the one expert who candidly admitted that he did not know the proper test. A. 72a. And, to that end, the court read this Court's decision in Godinez and particularly a sentence from the concurring opinions of Justices Kennedy and Scalia, 113 S. Ct. at 2688, that the Dusky "standard is applicable from the time of arraignment through the return of the verdict," as permitting the application of a lesser standard to post verdict determinations of competency. A. 48a.

Simply and plainly, the standard utilized and approved below neither referenced Dusky nor incorporated its express requirements. To the contrary, the standard omitted any

reference to the accused's ability to consult with counsel and thus omitted perhaps the most well-respected gauge of the mental functioning of the accused. See Godinez, supra, at 2689 (Kennedy, J. concurring). Under these circumstances, the court of appeals' ambiguous and terse finding that the standard employed by the district court was "essentially that required by Dusky . . . ," notwithstanding the district court's proposal of a "somewhat less stringent standard," A. 4a-5a, raises more questions then it answers. It neither affirms nor disaffirms the applicability of Dusky in the context of sentencing. And, it does not even begin to explain how the adoption and application of the district court's novel standard recognizes, preserves or protects the extent to which an accused is entitled to participate during the sentencing phase of a prosecution, let alone the constitutional imperative that the accused be competent to participate. Compare, Pellerito, 878 F.2d at 1544 (applying the Dusky standard to sentencing). Rather, it merely begs the question of whether an accused has a constitutional right *not* to be sentenced, unless found competent under the requirements of Dusky.

A similar "essentially the same" rationale was previously rejected by this Court in Godinez, supra, relative to the standard once employed by the Ninth Circuit with respect to the pre-trial phase of a prosecution: "Whether a defendant who seeks to plead guilty or waive counsel has the capacity

for 'reasoned choice' among the alternatives available to him." Godinez, 113 S. Ct. at 2686. There, too, the questioned standard arguably appeared at first blush to be essentially the same as the Dusky test. There, too, the adoption and application of a standard other than that expressly approved in Dusky, however, belied the idea that mere semantics were at issue. For what could be the point of questioning the applicability of Dusky, and what could be the point of applying something other than its expressed, time-honored language, unless the factfinder were loath to reference its terms when considering the salient circumstances of the accused.

Review on certiorari is necessary to clarify the proper test for determining competency during the sentencing phase of a federal criminal prosecution.

II. **An Important Question Exists As To Whether The Fifth And Sixth Amendments Require The Grant Of A New Trial On Grounds Of Newly Discovered Evidence That The Accused Was Incompetent At The Time Of Trial And His Counsel Were Ineffective In Failing To Raise Or Discover The Issue, When A Timely Motion For That Relief Was Made Prior To Sentencing And, Upon Hearing Of That Motion, The Only Evidence Presented Concerning The Accused's Condition At The Time Of Trial Was That He Suffered From An Organic Brain Disease Which Seriously Impaired His Ability To Understand The Nature Of The Proceedings And To Assist In His Defense.**

A well-established corollary to the constitutional

guarantee that no one be forced to face complex criminal proceedings unless competent, is the presiding court's duty to investigate the accused's mental competence whenever evidence comes to light--from any source, at any stage of the proceedings--that casts a bona fide doubt on the accused's fitness to participate. See e.g. Pate, supra, 383 U.S. at 385-386; Drope, supra, 420 U.S. at 179-182. This duty also arises under the dictates of § 4241.

This case presents an ideal opportunity for this Court to clarify the district's role in assuring that the accused's right to competency is recognized, preserved and protected in the context of a federal criminal prosecution.

The defense below did all that could be done to demonstrate that petitioner was incompetent as of the time of his trial. Petitioner's family and trial counsel memorialized their observations of his behavior just a few months after the fact. Petitioner's psychiatrist, when finally permitted to complete his examination, concluded that Mr. Liberatore was incompetent as of the time of trial. Though the defense requested that the district court consolidate the issues of retrospective and contemporaneous competency and, indeed, urged the court to order Dr. Denney to perform a retrospective exam at the earliest opportunity, the court declined to do either. Nevertheless, the court's experts both agreed that Mr. Liberatore suffered from Alzheimer's-type dementia as

of the time of his trial and that a serious question existed as to whether he was then competent for trial purposes. Of course, it is entirely undisputed and uncontroverted that absolutely *no* accommodation was made to account for petitioner's condition, either by trial counsel or the court.

Clearly, the evidence presented by the defense was exactly the type that required the grant of a new trial. See 18 U.S.C. § 4241 and Fed. R. Crim. Proc. 33. See also Saban-Gutierrez, supra, 783 F.Supp 1538; United States v. Seago, 930 F.2d 482 (6th Cir. 1991); Renfroe, supra, 825 F.2d at 766, 768; see also, legislative history of 18 U.S.C. § 4241, 1984 U.S. Code Cong. & Ad. News, ¶ 3 at 3416 ("Evidence that the defendant was incompetent at the time of trial most likely would be newly discovered evidence"). For, petitioner's impaired condition should have precluded his standing trial in the first instance and did preclude him from assisting in his defense, e.g., in participating in strategic decisions such as whether he would exercise his absolute right to testify. U.S. Const. Amend. 5 and 6; Godinez, supra; Riggins, supra, 112 S. Ct. 1810, 1818-1819 (Kennedy, J. concurring); Pate, supra; Drope, supra.

Nevertheless, the district court denied petitioner any relief. That denial was not because the accused had failed to present any evidence of incompetency. To the contrary, the court accepted the fact that petitioner was impaired, at least

to some degree, as of time of trial. See e.g., A. 25a, 43a. Nor was it because of the court's consideration of any countervailing evidence of competency--since *no* evidence of competency for purposes of trial was presented. Rather, the court's denial was predicated on its determination that petitioner had a higher burden, (because the competency issue was raised post-verdict), and *additional* evidence of the accused's mental status as of the time of trial should have been provided. E.g., A. 27a, 28a, 35a. The burden thus imposed on the accused was simply too high.

If the district court were sincere in its resolve that additional information was needed to shed further light on the issue of petitioner's competency, it was duty bound to obtain that information. And, *nothing* precluded the government or the district court itself (in furtherance of its duty) from calling additional witnesses or obtaining further retrospective evaluations. The court was not free, however, to ignore the uncontroverted evidence of petitioner's incompetency. See Drope, supra, Pate, supra. See also Dusky, supra, 362 U.S. at 403 (reversal warranted in view of the doubts and ambiguities regarding the legal significance of the psychiatric testimony and the resulting difficulties of retrospectively determining the petitioner's competency). In this regard, the court of appeals' summary affirmance of the district court wholly failed to account for the limits imposed

on the district court's discretion by the Fifth and Sixth Amendments and § 4241.

Review on certiorari is necessary to assure that the right to competency is fully recognized, preserved and protected in federal criminal proceedings.

CONCLUSION

For all the foregoing reasons, petitioner respectfully urges this Court to grant his petition for a writ of certiorari.

Respectfully submitted,

J. MICHAEL MURRAY
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APPENDIX

NOT RECOMMENDED FOR PUBLICATION
No. 94-3739
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

95 JUL 31 AM 11:36

CLERK U.S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO
AKRON

INFORMATION COPY
MANDATE NOT YET
ISSUED
DIS. CT. # 92-184

FILED
JULY 28 1995
LEONARD GREEN,
Clerk

UNITED STATES OF AMERICA,	)	
	)	FROM THE
Plaintiff-Appellee,	)	UNITED
	)	STATES
v.	)	DISTRICT
	)	COURT FOR
ANTHONY D. LIBERATORE,	)	THE
	)	NORTHERN
Defendant-Appellant.	)	DISTRICT OF
	)	OHIO

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.
This notice is to be prominently displayed if this decision is reproduced.

BEFORE: MILBURN and BATCHELDER, Circuit

Judges; and TODD, District Judge.*

PER CURIAM. Defendant-appellant, Anthony D. Liberatore, appeals his conviction and sentence. After a two-week jury trial, Liberatore was found guilty on all charges against him. Following the jury's verdict, the U.S. District Court for the Northern District of Ohio scheduled a sentencing hearing to be held on August 20, 1993.

Three hours before Liberatore's scheduled sentencing hearing, Liberatore's counsel filed a motion under 18 U.S.C. § 4241 seeking a hearing to determine defendant's competence to be sentenced. After Liberatore underwent psychological evaluation by several doctors, the district court held a two-day hearing on the subject of defendant's competency. After the competency hearing, the court determined that Liberatore was competent for sentencing, and sentenced Liberatore to 120 months in prison. *See United States v. Liberatore*, 846 F. Supp. 569, 581-82 (N.D. Ohio 1994). This timely appeal followed. After thoroughly examining the record in this case, and considering each of the issues raised by defendant-appellant Liberatore, we AFFIRM Liberatore's conviction and sentence.

---

* The Honorable James D. Todd, United States District Court for the Western District of Tennessee, sitting by designation.

I.

Defendant Liberatore was indicted and charged on nine counts including racketeering; conspiracy, aiding, and abetting of racketeering activity; and money laundering. The racketeering acts were facilitated by Liberatore's involvement with La Cosa Nostra and the Laborers' International Union of North America (L.I.U.N.A. or "Laborers"). La Cosa Nostra (LCN) is a nationwide, secret organization whose members engage in ongoing and organized criminal activity. One of LCN's goals is to control L.I.U.N.A. for the benefit of LCN members.

The Government identified Liberatore as the LCN member responsible for operating Laborers' Locals 310 and 860 in Northeastern Ohio. When Liberatore was not incarcerated, he held office within these locals. Even when Liberatore was imprisoned he was considered to be in control of all Laborers' activity in Cleveland: during periods of his imprisonment, Liberatore continued to receive income from the union, and union officials regularly visited him in prison to discuss union matters.

The charges against Liberatore arose out of Liberatore's formulation and control of several labor bribery scheme and a drug money laundering scheme. Through his connections with the Laborers, Liberatore ensured that particular construction companies received preferential treatment on

Union contracts and that Laborer officials neglected their union duties in exchange for favors and money. Liberatore also facilitated, for the benefit of a local drug dealer whom he had met in prison, a money laundering scheme through which drug money was invested in a union project to construct residential homes. The scheme provided for the drug dealer to receive half the profits from the sale of the residential homes while Liberatore and the builder would split the other half of the profits.

II.

Liberatore raises numerous issues on appeal, the principal one being that the district court improperly determined that he was competent to be sentenced. This Court reviews a district court's determination of competence for clear error. *United States v. Shepard*, 538 F.2d 107, 109 (6th Cir. 1976). Consequently, when substantial evidence supports a competency finding, we cannot overturn the finding as "clearly erroneous." *Id.* Here, we find that the district court's thorough and well-reasoned conclusion that Liberatore was competent to be sentenced is supported by substantial evidence. *See United States v. Liberatore*, 846 F. Supp. 569 (N.D. Ohio 1994). And although the district court's opinion might be read as proposing a somewhat less stringent standard for determining competency for sentenc-

ing than would be required for determining competency for the pretrial and trial phases of a criminal proceeding, it is clear that the standard that the district court applied in coming to its conclusion is essentially that required by *Dusky v. United States*, 362 U.S. 402 (1960) (per curiam). Consequently, we affirm the district court's holding.

Liberatore next alleges that his motion for a new trial was improperly denied. *See United States v. Liberatore*, 856 F. Supp. 358 (N.D. Ohio 1994). We review the district court's decision to deny a motion for a new trial for abuse of discretion. *Boburka v. Adcock*, 979 F.2d 424, 427 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 2933 (1993). The district court will only be overturned, therefore, if we form a "definite and firm conviction that the trial court committed a clear error of judgment." *Logan v. Dayton Hudson Corp.*, 865 F.2d 789, 790 (6th Cir. 1989) (citation omitted). No such clear error is present in the district court's judgment. On the contrary, we find the district court's careful analysis persuasive and its conclusions that Liberatore was competent at the time of trial and that the assistance of Liberatore's trial counsel was not ineffective well supported by the record. Consequently, we uphold the district court's denial of Liberatore's motion for a new trial. Likewise, Liberatore's separate assignment of error, that he was denied effective assistance of counsel at trial, is not sup-

ported by the record. As the district court properly found, Liberatore's trial counsel "behaved in an objectively reasonable way." *Liberatore*, 856 F. Sup. at 367. Nor, as the district court correctly found, was there any evidence that Liberatore was prejudiced by his counsel's performance at trial. *Id.*

Liberatore's remaining allegations include his contentions that: the district court improperly denied Liberatore's Rule 29 motion for acquittal on the RICO count; that several of the jury instructions given by the district court were improper; that the district court improperly excluded evidence; that the district court improperly enhanced Liberatore's base offense level for his role in the defense; and that the district court failed to comply with Criminal Procedure Rule 32. We do not find merit in any of these remaining claims.

We have reviewed Liberatore's claim of insufficiency of the evidence to determine whether any rational juror could have found the essential elements of the crime beyond a reasonable doubt. *United States v. Swidan*, 888 F.2d 1076, 1080 (6th Cir. 1989). After our review we find that the evidence at trial was sufficient to prove the RICO violation charged--that is, that the defendant was associated with an enterprise consisting of himself, Chester Liberatore, Dominic Olivo, and L.I.U.N.A. and its subordinates, and

that the defendant, including periods during which he was in prison, conspired to and did conduct and participate in that enterprise's affairs through a pattern of racketeering activity. The evidence at trial was also sufficient to prove that Liberatore's activity furthered the operation and management of the enterprise itself.

We review Liberatore's objections to the jury instructions for plain error, since Liberatore's counsel did not object to the instructions at the time they were given. *United States v. Goodlett*, 3 F.3d 976, 978 (6th Cir. 1993). We find that the RICO jury instruction was not plainly erroneous because sufficient evidence was presented at trial to prove that Liberatore had participated in the operation and management of the enterprise. Therefore, although the court did not instruct the jury that the "conduct or participate" language of § 1962(c) of RICO meant to participate in the "operation or management of the enterprise itself," the language used by the Supreme Court in *Reves v. Ernst & Young*, 113 S. Ct. 1163, 1173 (1993), we do not find that this error was so egregious as to result in a miscarriage of justice. Indeed, the language used by the district court to instruct on the RICO counts includes the instruction that the phrase "to conduct or participate directly or indirectly in the conduct of the affairs of the enterprise" means "the performance of acts, functions or duties which are necessary

or helpful in the operation of the enterprise." We conclude that the omission of the reflexive pronoun "itself" in this otherwise clear and accurate instruction can hardly be viewed as leading to a likely miscarriage of justice. Likewise, no plain error resulted from the district court's jury instruction on the Taft-Hartley charges. The requirement that the transactions constituting the violations exceed $1,000 is not an element of the Taft-Hartley offense and thus requires no instruction. The district court's instruction on willfulness properly stated the applicable law. *See United States v. Carter*, 311 F.2d 934, 943 (6th Cir.), *cert. denied sub. nom. Felice v. United States*, 373 U.S. 915 (1963).

We find that the district court properly excluded a taped conversation that Liberatore sought to introduce. Despite Liberatore's contentions, the evidence does not satisfy any of the exceptions to the hearsay rule.

We also find that the district court acted within its discretion in enhancing Liberatore's base offense level pursuant to the U.S. Sentencing Guidelines § 3B1.1(a). In this case, the district court's decision to add four levels to Liberatore's offense level was well supported by findings that Liberatore was accepted as the leader by the other participants in the labor violations. The court also found that the money laundering scheme depended on Liberatore's

involvement. In fact, the court viewed Liberatore's motivation throughout the illegal activity as an attempt to retain his position of power and leadership within the union organization, and this conclusion is supported by the record. Consequently, we uphold the district court's sentence calculation.

Finally, Liberatore contends that the district court failed to comply with Rule 32(c)(3)(A) of the Federal Rules of Criminal Procedure which requires the court to ensure that the defendant and defendant's counsel have had an opportunity to read and discuss the presentence investigation report (PSI). It is clear in this case, however, that both Liberatore and his counsel at sentencing had read and understood the PSI. For example, Liberatore's counsel raised specific objections to aspects of the PSI at the sentencing hearing at which Liberatore was present. The court further addressed Mr. Liberatore and inquired whether he would like to address the court, and Liberatore declined. Consequently, if there was any error in the district court's failing to explicitly determine that Liberatore and his counsel read and understood the PSI, the error was harmless.

III.

For the foregoing reasons, the defendant's conviction and sentence are AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No: 94-3739

Filed: August 30, 1995

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

ANTHONY D. LIBERATORE

Defendant - Appellant

MANDATE

Pursuant to the court's disposition that was filed 7/28/95 the mandate for this case hereby issues today.

A True Copy.

No costs taxed

Attest:

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NORTHERN DISTRICT OF OHIO
AKRON

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	CASE NO. 1:92CR184
Plaintiff,	)	
-vs-	)	
ANTHONY D. LIBERATORE,	)	
Defendant.	)	

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, ANTHONY D. LIBERATORE, was represented by J. Michael Murray and Jeremy Rosenbaum.

The defendant was found guilty on count(s) 1, 2, 5, 6, 7, 8, 9, 10 and 11 after a plea of not guilty. Accordingly, the defendant is adjudged guilty of such count(s), involving the

following offense(s):[1]

Title & Section: 18 USC 1962(c), Nature of Offense: R.I.C.O., Date Offense Concluded: 6/05/92, Count Number(s): 1;

Title & Section: 18 USC 1962(d), Nature of Offense: conspiracy to commit a R.I.C.O. violation, Date Offense Concluded: 6/0/592, Count Number(s): 2;

Title & Section: 29 USC 186(b)(1) & (d)(2), Nature of Offense: prohibited financial transaction between a Labor Leader and a Contractor, Date Offense Concluded: 01/89, Count Number(s): 5 and 6;

Title & Section: 18 USC 1956(a), Nature of Offense: money laundering, Date Offense Concluded: 3/14/91, Count Number(s): 7, 8, 9 & 10;

Title & Section: 18 USC 371, Nature of Offense: conspiracy to Launder Proceeds of Illegal Drug Sales, Date Offense Concluded: 3/14/91, Count Number(s): 11.

As pronounced on 21 March 1994, the defendant is sentenced as provided in pages 2 through 4 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

---

[1] The following offenses have been reformatted from their original column format into standard, indented paragraph format to include the Title and Section, Nature of Offense, Date Offense Concluded and Count Number(s) for each.

It is ordered that the defendant shall pay to the United States a special assessment of $ 450.00, for count(s) 1, 2, 5, 6, 7, 8, 9, 10 and 11, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this the 21 day of March, 19__.

/s/ Samuel Bell
Sam H. Bell, United States District Judge

Defendant's SSAN: 293-07-7661
Defendant's Date of Birth: 6/06/21
Defendant's address: 1573 Sunview Road; Lyndhurst, OH 44124

Defendant: ANTHONY D. LIBERATORE
Case Number: 1:92CR184

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 120 months on Count 1, 2, 7, 8, 9 and 10, to be served concurrently with each other and concurrently with 5 years on Counts 5, 6 and 11, which are to be served

concurrently with each other, to wit, a TOTAL sentence in this matter of 120 MONTHS.

The Court makes the following recommendations to the Bureau of Prisons; that the defendant be confined in the Federal Correctional Institution at Milan MI.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this Judgment.

_____
United States Marshal

By_____
Deputy Marshal

Defendant: ANTHONY D. LIBERATORE
Case Number: 1:92CR184

SUPERVISED RELEASED

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years.

While on supervised release, the defendant shall not commit another federal, state, or local crime; shall not illegally possess a controlled substance; shall comply with the standard conditions that have been adopted by this court (set forth below); and shall comply with the following additional conditions:

1. If ordered to the custody of the Bureau of Prisons, the defendant shall report in person to the probation office in which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.
2. If this judgment imposes a fine, special assessment, costs, or restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine, assessments, costs, and restitution that remain unpaid at the commencement of the term of supervised release.
3. The defendant shall not own or possess a firearm or destructive device.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

1) The defendant shall not leave the judicial district without the permission of the court or probation officer.
2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.
3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
4) The defendant shall support his or her dependents and meet other family responsibilities.
5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.
6) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.
7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances.

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Defendant: ANTHONY D. LIBERATORE

Case Number: 1:92CR184

STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the presentence report.

Guideline Range Determined by the Court:

Total Offense Level:	28
Criminal History Category:	III
Imprisonment Range:	97 months to 121 months
Supervised Release Range:	2 to 3 years
Fine Range:	$ 12,000.00 to $125,000.00
Restitution:	$0.00

The fine is waived or is below the guideline range because of the defendant's inability to pay.

The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

FILED
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CLERK U.S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO
AKRON

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	CASE NO. 1:92CR184
	)	
	)	JUDGE SAM H. BELL
Plaintiff,	)	
	)	
-vs-	)	ORDER
	)	
ANTHONY D. LIBERATORE,	)	
	)	
	)	
Defendant.	)	

Now pending before the court is defendant's motion for a new trial filed pursuant to Fed. R. Crim. P. 33. The instant motion is brought on the basis of newly discovered evidence. Specifically, defendant claims that he is entitled to a new trial because defendant has discovered since the time of trial that he was incompetent to be tried and because his trial counsel was ineffective. Many of the issues discussed herein were also discussed in this court's previous order relating to a motion under 18 U.S.C. § 4241

to declare defendant incompetent to be sentenced.[2]

I

Rule 33 provides that a district court may grant a new trial "if required in the interest of justice." As the Circuit recently repeated:

> In order to merit a new trial, [the defendant] was required to establish each of the four elements set forth in United State v. O'Dell, 805 F.2d 637, 640 (6th Cir. 1986), cert. denied, 484 U.S. 859 (1987):
>
> > (1) the new evidence was discovered after the trial; (2) the evidence could not have been discovered earlier with due diligence; (3) the evidence is material and not merely cumulative or impeaching; and (4) the evidence would produce an acquittal.
>
> In applying the four-part test, we recognize that motions for a new trial based on newly discovered evidence are disfavored and should be granted with caution.

United States v. Glover, ___ F.3d ___, 1994 FED App. 0119P (6th Cir. 4/12/94).

Stated generally, defendant claims to possess new evidence which would lead to his acquittal, that evidence being that he was not mentally competent to stand trial.

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[2] The previous order shall be cited herein as "Order at _____."

Defendant also moves for a new trial on the basis of newly discovered evidence of ineffective assistance of counsel based on his trial attorneys' failure to raise the competency issue before or during the trial.

A

The standard for evaluating when a defendant is mentally competent to stand trial was first stated in a brief per curiam opinion: 'the test must be whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding -- and whether he has a rational as well as factual understanding of the proceedings against him." Dusky v. United States, 362 U.S. 402 (1960) (per curiam).

In itself, the mere presence of a mental disease or defect is not sufficient to render a defendant incompetent under the standard set forth in Dusky or 18 U.S.C. § 4241, the statute governing mental competence. The disease or defect must be of sufficient magnitude to compromise defendant's mental capacities to the point that he functions below the level established in Dusky. This inquiry is a difficult one because it does not follow a bright line rule that any diagnosis of mental disease or defect is enough to demonstrate legal incompetency. The diagnosis of existence must be coupled with evidence of degree, to wit significant impairment. As the Eleventh Circuit explained in a case

involving a 74-year old man exhibiting signs of Alzheimer's Disease:

> The district court found that the minor defects in Hogan's cognitive abilities did not render him incapable of providing rational assistance to his attorney. Even perfectly competent defendants often do not fully comprehend the intricacies of some of the defensive theories offered by their lawyers. That level of comprehension is not a requirement of competency. All that is required is that Hogan had a rational as well as a factual understanding of the proceedings against him and had sufficient present ability to consult with his attorney with a reasonable degree of rational understanding. We cannot say that the district court clearly erred in finding that he did.

United States v. Hogan, 986 F.2d 1364, 1373 (11th Cir. 1993).

Accordingly, to sustain his burden under Rule 33, defendant must offer newly discovered evidence that he suffers from a mental disease or defect and evidence indicating that the disease or defect reduced his mental capacity to the point that he was unable to formulate a rational and factual understanding of the proceedings or consult with his attorneys with a reasonable degree of rational understanding.

B

With respect to defendant's claim of ineffective assistance of counsel, he must show that his attorneys' perfor-

mance fell below an objective standard of reasonableness. In addition, defendant must show that the deficient performance prejudiced his defense sufficiently to make it reasonably probable that it rendered the trial unfair and the result unreliable. Ward v. U. S., 995 F.2d 1317, 1321 (6th Cir. 1993). See also Strickland v. Washington, 466 U. S. 668, 687 (1984), reh'g denied, 467 U.S. 1267. In making this inquiry, the court is further bound to "give a highly deferential scrutiny to counsel's performance, making every effort to evaluate counsel's conduct from his or her perspective at the time the conduct occurred." Ward, 995 F.2d at 1321 (citing Strickland, 466 U.S. at 689) (emphasis added).

With these standards in mind, the court turns to the evidence presented.

II

As evidence, the parties incorporate the testimony received in conjunction with a previous competency motion. This testimony was received during the course of a two-day hearing. No additional evidence relating to a retrospective determination of the defendant's competency to stand trial was offered either by the defendant or by the government. The parties only made oral arguments at the second competency hearing. Accordingly, the court revisits testimony previously discussed, focussing on the areas highlighted by counsel in their arguments.

III

The evidence relating to the instant motion may be grouped into four categories. First, defendant presented anecdotal evidence from attorney Albert Giuliani, defendant's lead trial counsel, describing defendant's conduct before and during trial. Second, defendant offered lay opinion testimony from Giuliani regarding whether defendant was competent or not. Third, three expert witnesses testified regarding defendant's mental capacity at the time of the hearing. And last, the court received limited direct testimony from the experts regarding defendant's capacity at the time of trial.

The evidence shall be discussed in reverse order.

A

This court held a hearing to address defendant's claim that he was not mentally competent to be sentenced. That hearing did not explicitly include the specific factual question now before the court. During the course of examining the expert witnesses, however, it became apparent that defendant's condition at the time of the trial was indirectly relevant to the question of competency to be sentenced. Once this became apparent, both parties were permitted to elicit testimony from the experts regarding their opinions about defendant's mental capacity at the time

of trial.[3]

Dr. Robert L. Denney, Psy.D., testified that he was not comfortable giving an opinion on defendant's mental condition prior to June, 1992 when defendant's trial commenced. Dr. Denney did say that defendant suffered from dementia of an Alzheimer-type in June. The testimony from defendant's trial counsel, Albert Giuliani, relating to problems with the defendant while he was preparing for trial in May, 1992 was apparently not sufficient for Dr. Denney to conclude with any degree of clinical certainty that the defendant was impaired prior to June.[4]

The evidentiary value of this testimony is very limited. The opinion only alerts the court to the presence of a condition without addressing the critical question of how severe that condition was during the relevant time period.

Dr. Denney explicitly testified that he did not feel that the retrospective question was before him when he conducted his examination. Dr. Denney did not spend any appreciable amount of time inquiring into the defendant's

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[3] Hereafter, defendant's competency to be sentenced will be referred to as his contemporary competence. The question now before the court, defendant's competency at the time of trial, will be referred to as his retrospective competency.

[4] All three experts were present for most or all of the testimony of Albert Giuliani.

understanding of the elements of the crime, the nature of the evidence against him or the events which transpired in the courtroom. Without such inquiries, Dr. Denney was properly reluctant to offer an opinion regarding the extent of defendant's impairment at the time of trial.

Defendant asked Dr. Denney whether the testimony offered by the Giulianis raised a "serious question" about defendant's competence. The response was that it did. Of course, all questions regarding a defendant's right to participate in his trial are serious -- a fact which the psychologist plainly recognized. But, Dr. Denney did not testify that defendant was unable to reasonably and rationally consult with his attorney before or during the trial. He did not even testify that it was probable that defendant suffered such an impairment at the time of trial. At best, the testimony discussed concludes that retrospective incompetency is a possibility which would require supplemental evaluation to determine.

Defendant seems to suggest that this court prevented defendant from securing more detailed testimony from Dr. Denney. Specifically, defendant points out that in the interest of maintaining analytic consistency, this court took up the question of contemporary competence in a separate proceeding from the present proceedings relating to the question of retrospective competence. As a result, Dr.

Denney's evaluation of the defendant focussed on the former question and did no address the latter.

In fairness, however, defendant's argument fails to acknowledge that during the period between the ruling on the first competency motion and the hearing on the instant motion, no attempt was made to secure a referral to Dr. Denney for additional evaluation. Nor did defendant recall Dr. Denney at the second competency hearing. Likewise, defendant did not have any other doctor evaluate defendant since the last motion was resolved. This court did not prevent defendant from seeking additional expert information specifically dealing with retrospective competency. Defendant chose not to seek such supplemental opinions either from the experts used in the first hearing or from other experts.

Defendant also suggests that this case is analogous to Dusky v. United States, supra, and Lagway v. Dallman, 806 F. Supp. 1332 (N.D. Ohio 1992). In those cases, convictions were vacated because the original competency determination was erroneous and the passage of time rendered retrospective evaluation of the defendant problematic and unreliable. Defendant claims that so long as a "serious question" exists, defendant must be granted a new trial because a retrospective evaluation would be unreliable. This reasoning is flawed.

Lagway and Dusky are not procedural analogues to the instant cause. In both cases, the defendant raised the competency issue before an adverse verdict was returned. Retrospective evaluations were necessary only because the trial courts erred. In neither case was the defendant constrained by the specific requirements of Rule 33.

Here, defendant did not raise the issue of retrospective competency until after the verdict was returned. He is now obligated, under Rule 33, to produce evidence "that would lead to acquittal". The Rule does not permit vacating a conviction when the evidence suggests a mere possibility that an acquittal would follow. This court is unaware of any authority which establishes an exception to this rule in the instant cause.

In sum, Dr. Denney gave a very limited opinion. The inquiry described would not credibly have supported a more expansive opinion. In fact, it may be argued that by suggesting that this court prevented Dr. Denney from making additional inquiries, defendant all but concedes that the doctor's testimony, as currently constituted, is not sufficient to lead to acquittal.

Dr. Kurt A. Bertschinger's testimony was similarly circumscribed. While Dr. Bertschinger opined that it is likely that defendant had dementia of an Alzheimer-type at the time of trial, he too was unwilling to venture into the

more uncertain arena of speculation concerning the severity of that impairment. As he explained, a patient with Alzheimer-type dementia remains susceptible to other conditions which may affect mental capacity such as depression or anxiety. In fact, Alzheimer-type dementia may appear worse than it actually is if the patient has a superseding dementia. Conversely, an Alzheimer patient may display relative improvement from one point in time to another if the other intervening mental conditions which caused the Alzheimer-type dementia to appear worse than it actually was are eliminated.

Dr. Bertschinger testified that defendant probably suffered from depression after the trial. This opinion is based on defendant's conduct and his experiences after the verdict was returned. This opinion is credible because it is consistent with the apparent differences between the way in which defendant appeared to Dr. Denney earlier in the Fall and the way in which he subsequently appeared to Dr. Bertschinger. This opinion also reflects a sophisticated appreciation of the multiple, complex forces influencing defendant's condition.

Dr. Bertschinger also suggested that it was at least possible that defendant suffered from depression before and during the trial. Defendant immediately attacked that opinion because it was "mere speculation" and lacked a

requisite degree of clinical certainty. By cutting off and denigrating Dr. Bertschinger's opinions concerning possible pretrial depression, the view left by defendant is merely that defendant was suffering from mild dementia of an Alzheimer-type of unknown degree before and during trial.

In Dr. Bertschinger's opinion, an opinion which this court finds sound and persuasive, not all people diagnosed with Alzheimer-type dementia are legally incompetent. They are analogous in mental state to those retarded persons who, if not profoundly retarded, may be legally competent while clinically impaired. Accordingly, without an opinion regarding the severity of defendant's condition before and during trial, we find that Dr. Bertschinger's testimony does not constitute new evidence that defendant was incompetent at the time of his trial.

Dr. Charles A. deLeon did render a definitive opinion on defendant's competency at the time of trial. Because of the limitations imposed on his opinion by the selectivity of his interview process, the lack of sophisticated, multi-causal analysis and other defects in his analysis of legal standards applicable to defendant's condition, it is enough to say that Dr. deLeon's views are far from sufficient to justify setting aside the verdict in this case.

Interestingly, in rendering this opinion, Dr. deLeon explicitly said that he did not place great weight on the

Giuliani's testimony because they were making a retrospective reevaluation of defendant's conduct. Instead, Dr. deLeon relied on affidavits from the defendant's son and former spouse, as well as an interview with defendant's former spouse.

This expert witness spent only one hour with defendant. His opinion regarding retrospective testimony relies primarily on statements made by individuals not offered as witnesses by defendant. As a result, the court is ill-situated to assess whether the underlying factual predicate relied on by Dr. deLeon is one which this court would consider accurate. Also, his opinion does not incorporate the sophisticated multi-causal analysis which Dr. Bertschinger's testimony persuasively indicated is necessary in a case like this. As was discussed in the previous order, Dr. deLeon appears to have improperly assigned significance to certain statements made by the defendant and his family. See Order at 21. And finally, Dr. deLeon's conclusion that the defendant was incompetent was made in light of the defendant's description of the standard for legal competence. The actual legal standard is not as rigorous as the standard expounded by defendant.

Accordingly, we conclude that Dr. deLeon's factual assumptions were inadequate. Subjectively, Dr. deLeon's assessments of statements made to him reflect errors

apparently caused by his failure to adequately investigate the position adopted by the defendant throughout this case and in prior cases. Objectively, Dr. deLeon's analysis of defendant's condition appears to overlook other factors considered by the other experts.

The opinion rendered by Dr. deLeon is not seen as one which would justify setting aside the verdict in this case.

B

In addition to arguing that the experts directly testified that defendant was mentally incompetent at the time of trial, defendant also argues that incompetence at the time of trial can be inferred from the expert testimony regarding competence at the time of sentencing.

First, there is no evidence suggesting the rate at which defendant is regressing. There is, however, testimony that patients with Alzheimer-type dementia are affected in different ways and at different rates. Without evidence of a specific rate, projecting the defendant's past condition from his current condition is obviously problematic. Second, even assuming that extrapolation is possible and appropriate, to do so the court must know the current condition of defendant's Alzheimer-type dementia. Given Dr. Bertschinger's testimony that defendant's Alzheimer-type dementia may have appeared worse than it was because the defendant suffered a superseding post-conviction depression,

the starting point for the extrapolation is not clear. Finally, this court must express grave doubts about the clinical propriety of such an approach. If extrapolation were proper, then, presumably Dr. Denney or Dr. Bertschinger would have used this technique in reaching an opinion. Rather, as has been noted, both doctors insisted that additional inquiry would be necessary to render an opinion.

Accordingly, this court finds that inferring a past condition of competence based on presently determined competence and the known pathology of the mental defect is improper under the present circumstances in as much as the factual record is insufficient to support such a computation. The pathology of Alzheimer-type dementia is neither so uniform nor so defined to render a sufficient degree of predictability to the course of defendant's malady. Likewise, the degree of impairment attributable to the Alzheimer-type dementia is not sufficiently established to render any computation meaningful. And finally, such a computation would appear to be outside the appropriate use of the existing data according to the standards and norms of the mental health profession.

In short, the evidence that defendant may be currently impaired to an unknown degree by Alzheimer-type dementia is not sufficient to support a motion for new trial.

C

The last evidence to be considered is the testimony of trial counsel Albert Giuliani[5] who offered anecdotes tending to suggest defendant's capacity before and during trial. He also offered his opinion of defendant's competence.

At no time prior to the day of sentencing did any attorney for the defendant raise any issue relating to defendant's mental or physical ability to withstand trial. Only after the jury returned its verdict and immediately before this court was to proceed to sentencing was the issue of defendant's competence raised by defendant's new counsel and supported by defendant's lead trial counsel and long-time acquaintance, attorney Giuliani.

In the course of considering Giuliani's testimony in the first order, this court noted concern about his objectivity after the trial. See Order at pp. 9, 12-13. Specific reference was made to Giuliani's 18-year relationship with the defendant. Id. at 9. Reference was also made to the fact that the attorney's testimony was not corroborated by testimony from co-counsel Robert Dixon. Id. at 12. This

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[5] The testimony of Albert Giuliani's father, Elmer Giuliani, was discussed in the previous order. The elder Giuliani's testimony primarily relates to contact with the defendant after the trial and adds little to the current inquiry so it need not be reviewed at length. See Order at 5.

omission can not be ignored in light of Giuliani's testimony that during the trial, Dixon was in charge of answering the defendant's questions. It would appear that defendant has chosen not to call his former counsel who was by Giuliani's own description best situated to assess defendant's capacity, and as suggested by this court previously, a seemingly more objective and reliable witness.

In discussing Giuliani's testimony in the second hearing, defendant argues that the testimony must be accepted because it is unrebutted. Short of eavesdropping on defendant's meetings with counsel -- conduct constitutionally and professionally prohibited -- the government could not directly rebut Giuliani's testimony. The court's previous order did imply that defendant could corroborate Giuliani's testimony by calling Dixon, but defendant chose to present no witnesses at the second competency hearing. See Order at 12.

But the Giuliani testimony will not be set aside based solely on the failure of defendant to corroborate it with testimony from co-counsel. However, the failure to corroborate the previously discredited testimony renews the concern that trial counsel's recollections may be subject to the biases previously discussed.

In addition to concern that Giuliani may now subconsciously exaggerate past events out of concern for his client,

the court also find the testimony, even if accepted as true, difficult to reconcile with the expert opinions.

According to Giuliani, preparation sessions with defendant perceptibly declined in quality as the trial approached. In general, morning sessions were better than afternoon sessions. Giuliani believed that the afternoon sessions interrupted the daily routine established by defendant since his release from prison over a year before. Defendant was described as failing to remember the subject of discussions from previous days and asking questions which, in counsel's opinion, had been resolved during discussions on previous days. Also, when defendant answered questions, his answers in the beginning were vague and imprecise demanding patience and time on the part of counsel to focus and clarify them. Ultimately, Giuliani asked the defendant not to come to his office so that Giuliani could prepare for the trial undisturbed.

At the start of the trial, Giuliani apparently believed that defendant had improved and did understand what was transpiring, but, when the government played numerous tape recordings, defendant displayed confusion. Giuliani specifically testified that defendant complained about not being able to hear the tapes and not recognizing the voices. The attorney also testified that defendant continued to repeat questions and misevaluated the success of the only

defense witness.

Giuliani concluded by testifying that he currently does not believe that defendant was competent at the time of trial. The evolution of Giuliani's opinion about defendant's competence is best expressed in the former's affidavit:

> At first, I attributed this inability on defendant's part to his age, limited education and generally poor health as well as the rapid, fatiguing pace of trial. However, by the end of trial and particularly the last two days of trial, defendant's condition deteriorated dramatically to the point that, in hindsight, I now question whether he was competent to receive the jury's verdict.

(Giuliani aff. at ¶ 5.)

During cross-examination of the experts, defendant elicited a description of the course of Alzheimer-related dementia. The general course of the disease is a slow, progressive deterioration. Dr. Bertschinger's previously discussed testimony indicates that the Alzheimer progression may appear different in each patient based on the absence or presence of additional mental maladies. But in general, the testimony suggests that Alzheimer-type dementia follows an irreversible pattern of gradual mental decline.

According to Dr. Denney, a period of a few months is not usually significant in the overall regressive course of Alzheimer-type dementia. In other words, the relative

change in a person's mental capacity over any period of a few months will generally not be great. Giuliani testified that defendant noticeably regressed in the weeks preceding trial, perceptibly improved at the beginning of trial and then dramatically regressed in the last days of trial. According to the attorney's lay observation, defendant experienced three measurable shifts in capacity in less than two months.

This pattern is not consistent with the overall Alzheimer pattern described by the experts during defendant's cross-examination. The described pattern is at least not superficially inconsistent with Dr. Bertschinger's brief speculation that the defendant possibly suffered depression before and during trial. Defendant attacked this opinion as "mere" speculation unsupported by the necessary clinical predicate to render it scientifically reliable. Dr. Bertschinger agreed that there was less certainty about this possibility than about his opinion that defendant probably was depressed after the trial.

By virtue of defendant's cross-examination of the experts, the court is left with testimony about the general course of defendant's probably Alzheimer-type dementia. This course is not consistent with the conditions observed by Giuliani. Defendant aggressively squelched any speculation by Dr. Bertschinger about other diseases or defects

which would have been more consistent with the observed conditions.

This record can be viewed in a number of ways. First, Giuliani's recollections may be inaccurate due to bias as previously discussed and thus the shifts may not have occurred as he now remembers them. Second, defendant's alleged behavioral shifts may not have been caused by defendant's mental condition but rather were his unimpaired reaction to the trial. In the previous order, the second possibility was considered and adopted. See Order at 10-11.

The fact that defendant's dramatic decline at trial is described as having occurred at the point in the trial when the most personal and damaging evidence was offered by the government is too great a coincidence to overlook. Parenthetically, the fact that the decline occurred at this point is tangible evidence that defendant did appreciate the evidence being offered against him. Also, undiscussed by either party is the fact that defendant has a hearing problem. It is not implausible that defendant's confusion and frustration arose from an auditory rather than a mental failing. The fact that defendant specifically complained that

he could not hear the tapes suggests this as an explanation.[6]

It is evidence from defendant's interview with Dr. Bertschinger as well as from defendant's conversations on the logger tapes from Springfield that defendant did recall elements of the offense, the identities of individuals who testified, the circumstances under which they testified, and the potential strengths or weaknesses of some of that testimony. While the evidence before the court does not indicate that defendant understood every detail of the charge or of his trial, that kind of proof is not the government's burden now or ever. Evidence that the defendant does have contemporaneous rational understanding and reasonable recollection of the trial, however, does cast doubt upon Giuliani's description of a totally confused, incompetent client.

Defendant assumes that all of defendant's conduct is caused or affected by his Alzheimer-related dementia. The experts' opinions contradict this assumption. Since the record does not contain a definitive assessment of the contemporaneous severity of the Alzheimer-type dementia, it is impossible to predict whether the dementia was severe

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[6] The government also distributed transcripts of the tapes played at trial, so even if defendant had difficulty physically hearing the tapes, he still had the ability to follow the evidence being offered.

enough at the time of trial to produce the described conduct. We must not ignore the uncontradicted evidence that an individual in the early, mild stages of Alzheimer-type dementia remains rationally aware of his surroundings and circumstances.[7] Giuliani's testimony is consistent with an individual who was rationally aware of his surroundings and circumstances. Defendant's post-trial telephone conversations and his interview with Dr. Bertschinger are also consistent with an individual who was rationally aware of events at this trial and the general issues involved in the charges against him.

To find defendant retrospectively incompetent based upon Giuliani's testimony, the court must reject the reasonable possibility that defendant's behavior was a rational response to the pressures of trial and adopt the conjecture that the behavior was caused by a mental disease of relatively undefined severity. The record does not support choosing the latter view.

In sum, the court finds the relationship between Giuliani and defendant to be a close one existing over many

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[7] Dr. Bertschinger testified that patients in the early stages are often aware of the world around them and are also acutely aware that there are certain things which they can no longer do or remember. According to Dr. Bertschinger, rational recognition of their growing limitations and their bleak prognosis causes some patients to suffer depression.

years. While this closeness no doubt enhanced counsel's efforts at trial to zealously represent his client, it now raises concerns for this court when counsel presents unrebuttable testimony relating to matters never before raised. Necessarily, the court must search the record for independent corroboration or consistency with objective evidence. Giuliani's testimony is not corroborated, and the testimony raises questions of consistency. Viewed in relation to the expert testimony, Giuliani's testimony is more consistent with a non-Alzheimer explanation for the behavior than with the Alzheimer explanation pressed by defendant.

Accordingly, the testimony of Albert Giuliani is not sufficient new evidence upon which to grant a motion for a new trial.

IV

Given the conclusion reached in part III, this court can not find trial counsel ineffective. The record reflects that while dealing with defendant may have been difficult at times, defendant's reactions were not outside the range of behaviors a trial attorney will ordinarily observe in a defendant involved in an extraordinary case like this. Giuliani's affidavit plainly reflects that he was aware of defendant's conduct and that he ascribed it to a reasonable cause. He made special efforts to accommodate defendant by designating co-counsel to deal with defendant.

The evidence currently before the court fails to demonstrate that defendant was incompetent. To conclude that defendant would have been found incompetent had a hearing been held before or during the trial, this court would have to indulge in rank speculation. The evidence, considered as a whole, confirms that while defendant probably suffers from a mental disease, the disease is of unknown severity and, at the time of trial, may not have affected defendant's competency in a legally significant way. The mere fact that counsel was unaware of the disease does not render him ineffective when it appears from the record that the disease did not significantly impair his client's capacity.

At the time of trial, defendant counsel behaved in an objectively reasonable way. Moreover, there is no evidence that defendant was prejudiced by the allegedly deficient performance. Accordingly, there is no evidence of ineffective assistance of counsel.

V

As indicated, this court is not persuaded that defendant was incompetent at the time of trial. Nor is this court persuaded that his trial attorneys were ineffective. Defendant's motion for a new trial is DENIED.

IT IS SO ORDERED.

/s/ Samuel Bell
SAM H. BELL
U. S. DISTRICT JUDGE

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CLERK U.S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO
AKRON

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	CASE NO. 1:92CR184
	)	
	)	JUDGE SAM H. BELL
Plaintiff,	)	
	)	
-vs-	)	ORDER
	)	
ANTHONY D. LIBERATORE,	)	
	)	
	)	
Defendant.	)	

On August 20, 1993, defendant was to be sentenced as a result of his conviction on nine felony counts. Three hours prior to sentencing, defendant filed a motion under 18 U.S.C. § 4241 seeking a hearing to determine his competence to be sentenced. That motion was supported by affidavits from Elmer Giuliani and Albert Giuliani.[1] The

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[1] Albert and Elmer Giuliani will be referred to on frequent occasion by their first names. This is done only to distinguish which of them is the subject of discussion and not because of disrespect or overfamiliarity.

former, a longtime personal friend of the defendant, was also defendant's original trial counsel but withdrew shortly before the trial for reasons of health. The latter, also an acquaintance of the defendant for over 20 years, succeeded his father as lead trial counsel. The content of the affidavits was sufficient to raise the issue of defendant's ability to understand the nature of the sentencing proceedings and raised the possibility that defendant could not offer his attorney assistance to the extent required at the sentencing phase of a federal criminal prosecution.

Pursuant to 18 U.S.C. § 4241(b), this court ordered defendant remanded to the custody of the Medical Center for Federal Prisoners in Springfield, MO for psychological evaluation. Dr. Robert L. Denney, Psy.D., prepared and filed a report based on that evaluation. This court also ordered that defendant be examined by Dr. Kurt A. Bertschinger, M.D. Finally, upon defendant's motion, this court permitted defendant to be evaluated by Dr. Charles A. deLeon, M.D. Drs. Bertschinger and deLeon also filed reports and testified.

Pursuant to 18 U.S.C. § 4241(c), a hearing was held. Over the course of two days, the court heard testimony from all three doctors, the Giulianis, prosecuting attorney James Wooley and Federal Bureau of Investigation case agent Jerry Personen. The government played six logger tapes of

phone calls made by defendant while at Springfield. The defense played one logger tape. In addition, the government submitted 20 other tapes comprising the complete set of defendant's phone calls while under evaluation at Springfield.[2] The court has reviewed the tapes not played at the hearing.

Section 4241 provides in pertinent part:

> If, after the hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense, the court shall commit the defendant to the custody of the Attorney General.

18 U.S.C. § 4241(d).

The procedures outlined in section 4241 are designed to protect defendant's due process right not to be tried while mentally incompetent. As the parties are well aware, this court has recently had occasion to discuss the issue of a criminal defendant's substantive protection from trial while incompetent. See Lagway v. Dallman, 806 F.2d 1332, 1331-1332 (N.D. Ohio 1992). Since that opinion, the Supreme Court has once again discussed the same issue.

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[2] The logger tapes do not include phone calls made by defendant to counsel.

In Godinez v. Moran, 125 L. Ed. 2d 321, 330 (1993), the Court considered what standard of competence is to be applied in determining whether a guilty plea or the waiver of the right to counsel were valid. In conjunction therewith, the Court reaffirmed the General application of the so-called Dusky standard upon which this court relied in Lagway. Specifically, the Court held, "the standard for competence to stand trial is whether the defendant has 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding' and has 'a rational as well as factual understanding of the proceedings against him.'" Id., quoting Duskey v. United States, 362 U.S. 402, 402 (1960) (per curiam).

It appears, however, that possibly certain Justices may entertain the opinion that while Dusky is the appropriate standard during pretrial and trial phases, a different, unarticulated standard, may govern sentencing. Justices Kennedy and Scalia, in a concurrence, explained: "We have not suggested that the Dusky competency standard applies during the course of but not before trial. Instead, that standard is applicable from the time of arraignment through the return of a verdict." Id. at 335 (Kennedy, J., concurring).

Even assuming that the view expressed in Justice Kennedy's opinion is not embraced by a majority of the

court, the rationale which supports limiting Dusky to pre-verdict phases is similar to the rationale which leads courts to tailor the application of Dusky to the particular circumstances. Specifically, appellate courts have recognized that in certain non-trial proceedings, such as sentencings and probation revocation hearings, "the test is whether the defendant is able to understand the nature of the proceedings and participate intelligently to the extent participation is called for." Chavez v. United States, 656 F.2d 512, 518 (9th Cir. 1981), (citing Sailer v. Gunn, 548 F.2d 271, 274 (9th Cir. 1977) ("consideration should be given to the extent to which he can be expected to participate in those proceedings and the nature of that participation.")). Stated more fully:

> Trial courts must assess a defendant's competence with specific reference to the gravity of the decisions the defendant faces. de Kaplany v. Enomoto, 540 F.2d 975, 985 (9th Cir. 1976) (en banc), cert. denied, 429 U.S. 1075 (1977). The test for competence is thus traditionally stated in different terms depending upon the decisions and consequences presented to the defendant by the particular proceeding. It might be constitutionally fair to require a marginally competent defendant to make certain kinds of decisions, but not others.

Id. at 518.

Necessarily, then, as this court considers the evidence, it does so in recognition of the fact that the current inquiry

relates specifically to defendant's present capacity to be sentenced. The instant question presented is not defendant's competence at the time of trial. Likewise, we do not now consider defendant's competence at some point in the future when he may wish to assist in an appellate procedure. Accordingly, this court now considers the evidence to determine whether defendant understands the nature of the sentencing proceeding and can offer the kind of rational assistance expected of a federal defendant in conjunction with the sentencing phase of his prosecution. To do so properly, the court must make specific findings of fact.

I

The Giuliani's testimony is but marginally relevant to the instant proceeding. Neither Giuliani testified about recent contact with the defendant. Rather, in the case of Albert, the testimony primarily related to impressions of the defendant immediately before and during trial. Albert did testify that he attempted to speak to defendant about sentencing a number of times immediately after the verdict but that defendant was not coherent. Albert dictated a statement which the defendant was to deliver to the probation officer to stating that defendant would not answer questions because he intended to appeal.

Elmer's testimony focussed primarily on his impression

of the defendant from a jail visit shortly after the jury returned the guilty verdicts. As evidence of defendant's current mental condition, this anecdotal testimony is of little value.

The Giulianis' testimony is of note, however, because both Dr. Denney and Dr. deLeon used the Giulianis as sources for their reports. To that extent, the court must consider the testimony to determine if the primary information which provides substantive factual support for the experts' opinions is credible.

Albert Giuliani testified that the defendant was often difficult to work with because, from day to day, the defendant did not recollect what had been previously discussed. Shortly before the trial, Albert told the defendant that in the interest of allowing counsel to focus on pretrial preparation, he had to cancel their practice of daily meetings. Albert also testified that the defendant seemed worse in the afternoon.

The testimony further indicated that defendant seemed to improve at the beginning of the trial, but that as the trial progressed, and specifically once the prosecution began playing various logger and interview room tapes, his behavior became more difficult. Ultimately, Mr. Giuliani explained that co-counsel Robert Dixon was designated to deal with defendant's questions because Albert could not

continue to re-explain things to the defendant and focus on the trial.

The testimony of Elmer Giuliani described defendant as looking awful when he visited him at the jail after the conviction. Defendant told Elmer that he was afraid in his cell because he saw a naked woman with flowers around her neck lying on his bunk and that he saw rats and worms. Elmer indicated that it was impossible to discuss questions relating to sentencing issues.

With respect to the hallucinatory episodes, some of the expert witnesses indicated that hallucinations are inconsistent with the dementia diagnosed. Dr. Bertschinger further explained that there are many explanations including toxicity, anxiety related to sudden relocation or malingering. Toxicity could arise from a change in the battery of medicines which defendant takes due to heart disease. Dr. Bertschinger also indicated that many older people suffer hallucinations for a short time when they are abruptly moved to a new environment like a nursing home. The same rationale could apparently apply to an individual, such as the defendant, who is abruptly taken into custody and returned to jail, especially when it appears defendant was led to believe that the jury deliberations would take considerably longer than the three hours which actually occurred. Finally, it is not necessary to comment extensive-

ly on the possibility of malingering except to add that Dr. Bertschinger indicated that delusions are often problematic because they are difficult to confirm.

Thus, this court discounts the testimony relating to hallucinations. First, aside from Elmer's testimony and a single reported sighting of rodents in his cell when he first arrived at Springfield, there is no evidence of further, and certainly not recent, hallucinations. Defendant never mentioned delusions of any kind in his phone conversations with his family. The record suggests that whatever may have caused the visions, if they in fact did occur, is not longer present. Second, the mental health experts who testified did not regard the hallucinations as significant and did not appear to factor possible hallucinations into their capacity assessments.

Albert Giuliani's testimony regarding defendant's ability to understand legal advice and participate in his defense poses a different problem. As a cursory review of the record in this case will indicate, the court and counsel had occasion to spend a great deal of time together through every phase of the trial. This proceeding was marked by consistent professionalism and cordiality between the defense and prosecution as well as between the attorneys and the bench.

At various times during the trial, the attorneys, very

properly, brought issues to the attention of the court which arose outside the presence of the court or the other party. For example, while the defense initially planned on offering the testimony of Larry Dean Dusenberry, as soon as defense counsel learned that Dusenberry intended to exercise his Fifth Amendment right against self-incrimination on cross-examination, it was brought to the court's attention so counsel could be secured for Dusenberry and a potential mistrial situation averted. Ultimately, despite defendant's apparent confidence that the testimony of Dusenberry would exonerate him, the testimony was not used because it appeared to be relatively certain that Dusenberry would refuse to answer questions on cross-examination.

At that time, Albert Giuliani stated:

> Last night Mr. Dixon and myself discussed this matter. We certainly did not want to be withholding this information from the court. We also did not want to be a part of anything that would look like it was an act on our part to pull a sham on the court or the prosecution, because we feel as of this point the court has done everything possible to keep this a fair trial.

(Trial tr. at 1158).

This anecdote does not directly bear on the issue of competence. It does, however, illustrate the context for this court's confidence that the attorneys remained candid with the court throughout the trial and actively followed a

conservative ethical course during the trial to avoid the specter of injecting error. It is in this context which the court must consider Mr. Giuliani's post-trial statement. The theme of this statement is best summed up in his affidavit supporting the motion for this hearing:

> At first, I attributed this inability on defendant's part to his age, limited education and generally poor health as well as the rapid, fatiguing pace of trial. However, by the end of trial and particularly during the last two days of trial, defendant's condition deteriorated dramatically to the point that, in hindsight, I now question whether he was competent to receive the jury's verdict.

(Albert Giuliani aff. at ¶ 5.)

While it is considered axiomatic that hindsight is 20/20, that is not in facts always the case. An individual's perception of events is always colored by context, whether the events are occurring contemporaneously with the assessment or occurred sometime in the past. Indeed, experience with witnesses over the years confirms that explanations of the past are constantly tempered by considerations of the present.

The court is forced, in evaluating the credibility of this attorney's assessment, to consider the long relationship he has had with the defendant. In 1972, Albert met the defendant when he sought a summer job with the Laborer's Union. The relationship started then and continued

through the years, facilitated by Albert's father's close friendship with the defendant. Through the vicissitudes of this long prosecution, the court does not doubt that whatever bond existed before Albert became defendant's attorney, his sympathy for the defendant increased.

Yet, at the time of trial, the record clearly indicates that counsel did not raise any concern relating to the defendant's mental health. At the same time, the court was made well aware of the long-term physical problems suffered by defendant relating to his heart and lung conditions and how they might impact on the course of the trial day. The court, as a result, attempted to be sensitive to requests for breaks or recesses because of health reasons and frequently observed the condition and conduct of the defendant to assure that defendant was not, in fact, finding it too difficult to remain attentive due to the length of the trial day.

By no means does the previous paragraph imply that this court believes that its contact with defendant was sufficient to reject the assessment of his counsel who plainly had more extensive and substantive experience with the defendant. Indeed, having discussed Lafferty v. Cook, 949 F.2d 1546 (10th Cir. 1991), cert. denied, 118 L. Ed. 2d 548 (1992), in Lagway, this court is well aware of the caution which is advisable in relying upon demeanor as a basis for

determining competency. The fact that Mr. Giuliani did not contemporaneously report his client's allegedly inappropriate conduct of which he now complains requires this court to consider more closely the particular behavior in question.

For example, Albert testified that defendant's attention improved between the time of the cancellation of further daily meetings for pretrial preparation and the beginning of the actual trial. Albert indicated that defendant's regression during the trial, if that is what it was, corresponded approximately to the point in the trial when the government began playing tape recordings. The substantive evidence of the overt acts underlying the racketeering charge were, in large part, established through those recordings. While defendant's regression could be explained as a result of a mental defect, the regression is also susceptible to the more conventional explanation that as highly inculpatory evidence was presented, he became more withdrawn and depressed. Likewise, given remarks by both the defendant and his ex-wife that he has been the target of a 'federal vendetta' manifesting itself through a pattern of invasions of privacy, the defendant may well have resented hearing his intercepted conversations with friends and family played in open court.

Counsel also testified that defendant responded in an

inappropriate way to the testimony of Mr. DeLucca. And indeed, for trained counsel to believe that DeLucca's testimony was anything but what he terms a 'catastrophe' would strain credibility. It must be understood, however, that DeLucca testified out of order. Due to his limited availability, the prosecution allowed the defense to offer DeLucca's testimony during the prosecutions case. DeLucca, a longtime friend and business associate of the defendant, to that point in the trial, was the only witness to say anything good about the defendant.

In this court's experience, it is not unusual for a defendant to only recognize the good things that friends say and not to recognize the damage, sometimes substantial, inflicted through cross-examination. This is not necessarily the result of impaired mental capacity, but is again the result of the prisms through which all individuals view experiences.

This court does not doubt that the defendant was, at times, of only marginal assistance to his attorneys. Again, given his education and substantial life experience spent behind bars, this fact is not surprising. After trial, however, another firm undertook defendant's representation. This provided an opportunity for Albert to set aside the sound professional judgment consistently exercised during the course of trial and to consider the events more

personally.

As an attorney, Mr. Giuliani concluded that there was nothing irregular and proceeded through the trial. We note, parenthetically, that Robert Dixon, co-counsel upon whom responsibility for answering defendant's questions during trial devolved, no doubt shared this assessment because he did not raise this issue at any time, nor has it been implied that he even suggested the issue. Now however, as a friend, as well as advocate, Mr. Liberatore's attorney may well perceive a different reality derived from the same factual predicate.[3]

This court perceives nothing sinister in Albert's present assessment of the defendant's capacity. But in evaluating the testimony in light of the other evidence, including this court's observation of defendant contemporaneous with Albert's observations, we must make a credibility assessment. There are, as the jury charge in this case explained, many components to credibility, including bias. Every witness has a bias and the fact finder has the obligation to determine that bias and consider it in conjunction with the testimony considered as a whole.

The court finds that the specific conduct described by

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[3] Mr. Dixon neither filed an affidavit nor testified that he presently believes that defendant is currently incompetent or that his behavior at trial, viewed retrospectively, indicates incompetency.

Mr. Giuliani is often susceptible to more than one explanation. At the time of trial, counsel concluded that one explanation was more probable. Now, counsel asserts a very different explanation which substantially impacts on defendant's rights during trial as well as now. Respectfully, this court is inclined to place greater weight on counsel's contemporaneous assessment of the defendant's circumstances both because such an interpretation is more consistent with what the court personally observed and because the court suspects, given the high degree of professionalism exercised throughout the trial, that the first assessment was less influenced by a personal relationship with the defendant which may now color judgment in light of the jury verdicts.

To the extent that Elmer Giuliani's testimony is consistent with that of his son, the same reasoning militating in favor of discounting its credibility applies. And as previously indicated, Elmer's testimony relating to hallucinations is not consistent with the expert assessments and if the delusions really occurred, they apparently represent a post-verdict condition which quickly passed.

In sum, this court is wary of placing great reliance on the testimony of the Giulianis. First, the evidence itself is of limited relevance to the question currently posed -- is the defendant presently competent? Second, the evidence is in

places of no apparent significance to the mental health experts, notwithstanding the shock value which hallucinatory episodes may have to a lay person. Third, the assessments now before the court are inconsistent with assessments made at trial and appear to suffer from a more personal motive than the disinterested professional judgment exercised at the time of trial.

II

It is appropriate, therefore, to now consider the testimony and reports of the mental health experts. These reports are necessarily more probative of the capacity issue both because of the greater expertise of the evaluators and because the evaluations were geared to the current question of present capacity. Presumably, the evaluators are also more objective than longtime personal friends may be.

Before considering the experts, it is appropriate to briefly revisit a subject which this court considered in Lagway--the role of mental health experts in competency determinations. To that end, it is worth repeating two passages quoted in Lagway.

> The question of competency calls for a basically subjective judgment. . . . [T]he competency determination depends substantially on expert analysis in a discipline fraught with subtleties and nuances. Consequently, it is this Court's job to weigh the evidence and determine questions of credibility. Faced with a record that supports conflicting inferences, this Court must consider the

> opinions of the psychiatric experts in light of the surrounding circumstances and determine which opinion is more realistic and credible given the evidence testimony, law witness testimony concerning the Petitioner's rational behavior, and cross-examination of petitioner's expert.

United States v. Rigatusa, 719 F. Supp. 409, 416 (D. Md. 1989). Objective reasons for rejecting an expert's opinion include:

> (1) the correctness or adequacy of the factual assumptions on which the expert opinion is based;
>
> (2) possible bias in the expert's appraisal of the defendant's condition;
>
> (3) inconsistencies in the expert's testimony, or material variations between experts; and
>
> (4) the relevance and strength of the contrary lay testimony.

Strickland v. Francis, 738 F.2d 1542, 1552 (11th Cir. 1984).

The court's analysis and eventual decision in this matter must be based on the totality of the evidence submitted. The opinion evidence offered by the physicians who testified and submitted written reports concerning their findings is a part of that totality. It is obvious that each of the examining doctors is qualified and capable of performing the tests employed by them to assess the competency of this defendant.

In assessing the validity and assigning the weight to be

given to the opinions expressed, it is necessary to go beyond the persuasion of technical expertise. One must inquire concerning such items as the basis of the opinion, the adequacy of psychological testing procedures, the hypothesis of fact taken to begin the analysis of defendant's difficulties, and the dependency or lack of dependency on the views and opinions of others (as well as the reasonableness of doing so). One must also inquire whether the opinion is materially different now than it was at some point in the past, and the firmness of the opinion when tested by new facts or hypotheses or, indeed, facts unknown at the time of testing. This court must also consider the adequacy of the testing process from a temporal standpoint, the statements of defendant known to the examiners (not limited to those made in an interview setting) and, of course, the interest of the examiners, if any, in having their opinions accepted and their interest in the outcome of the case. Again, the court must make definitive findings of fact.

With these standards in mind, we turn to the report and testimony of Dr. Denney.

In Denney's opinion, defendant suffers from "primary degenerative dementia of the Alzheimer type, senile onset, uncomplicated." The impact of this condition was reported as follows:

> His current mental condition impacts his ability to participate in legal proceedings in several ways.

> He will have difficulty following lines of reasoning when discussing his defense with counsel. He will have difficulty remembering what occurred during previous discussions. He may very well have difficulty recalling events to accurately assess merits of the Presentence Report. In addition, his memory impairment would hinder his ability to testify on his own behalf. Lastly, his mental condition and orientation will fluctuate to some degree on a daily basis, such that it would be impossible to predict when he would be his best. Although Mr. Liberatore appears to be an intellectually capable individual during brief conversations, in-depth questions and discussion reveal serious impairments.
>
> In this evaluator's opinion, Mr. Liberatore suffers from a mental disease or defect rendering him mentally incompetent to the extent he is unable to understand the nature and consequences of the proceedings against him or assist properly in his defense.

(Denney at 9.)

On its fact, this report is somewhat problematic because it appears that Dr. Denney did not originally understand the nature and consequences of the proceedings which defendant now faces and did not appreciate the kind of assistance he would be called on to give his attorney. For example, the right of allocution which defendant does have is far less complex than the right to testify before the jury, or for that matter, the right not to testify.

At the hearing, Dr. Denney clarified his position vis a'

vis defendant's ability to perform tasks appropriate to the sentencing phase of a prosecution. In fact, Dr. Denney, reversing the conclusion in his report, confessed that as to the nature and consequences of the sentencing, it would be easy for the defendant to understand the sentencing. When examined by defendant's counsel as to whether the defendant was impaired or significantly impaired in his ability to give assistance, Dr. Denney's answers tended to indicate that the defendant was impaired. Unfortunately, Dr. Denney's answers were necessarily predicated, on occasion, on the assumptions about competence made by defense counsel.

Contrary to the belief of the defendant, this court does not believe that at sentencing, a defendant need have the ability to rationally and meaningfully discuss the substance of rulings relating to the admission of evidence. Nor is it relevant whether the defendant can provide any assistance relating to deciding what issues should be raised on appeal. Likewise, the court believes that while a defendant must understand the nature of the charges and have some understanding of the underlying factual context of the case, the defendant need not possess the degree of sophistication necessary to understand the specific technical procedures for seeking a new trial through post-trial motions. All of these functions should be provided by counsel.

At this juncture, it is appropriate to note that references to sentencing refer not only to the elements of sentencing which render each case different from others, but also to the process itself, here governed by the guidelines of the Federal Sentencing Commission. Defendants and counsel are presently confronted by defined, multifaceted, and generally specific standards that determine both the probable measure of the sentence to be imposed (the guideline range) and the exactness of that sentence (the placement of the penalty within the guideline range).

This being so, our inquiry must address the competency of the defendant in relation to sentencing in general as well as to his competency as it relates to the present method of configuring the sentence to be imposed. Thus, we consider his ability to assist counsel in confirming the correctness of the chosen scoring for acceptance of responsibility, relevant conduct and criminal history. We must also consider other such guideline criteria. To the degree that defendant may 'speak' in mitigation in the presentence report, we must consider his ability to assist his counsel in doing so in the same manner that we consider his ability to perform the same or similar function by way of allocution.

While every defense lawyer hopes that his client will possess high degrees of reason and eloquence, the reality is

often quite different. "Even perfectly competent defendants often do not fully comprehend the intricacies of some of the defensive theories offered by their lawyers. That level of comprehension is not a requirement of competency." United States v. Hogan, 986 F.2d 1364, 1373 (11th Cir. 1993) (upholding trial court finding that 74-year old Alzheimer victim was competent to stand trial). In passing, we note that given defendants limited education and lifetime of frequent and lengthy incarceration, it is possible that this defendant never had the abilities to which his counsel now claims defendant must aspire. Further comment on this possibility, however, is inappropriate because the evidence does not include historical evidence of defendant's intelligence.

A review of case law further indicates that defense counsel may have been incorrect in suggesting that defendant must be incompetent because he does not remember details from his past in as much as courts have upheld the conviction and sentences of individuals suffering from anteriorgrade amnesia even when the amnesia extends to the crime itself.

> A defendant's amnesia about events surrounding the crime will not automatically render him incompetent to stand trial. United States v. Sullivan, 406 F.2d 180, 186 (2d Cir. 1969(. Rather, the propriety of trying a given amnesiac defendant must be determined in light of his own individual

> circumstances. Factors to be considered include whether the defendant has any ability to participate in his defense, whether the amnesia is temporary or permanent, whether the crime and the defendant's whereabouts at the time of the crime can be reconstructed without his testimony, whether the government's case is strong or weak. See e.g., United States v. Rinchack, 820 F.2d 1557, 1569 (11th Cir. 1987); United States v. Swanson, 572 F.2d 523, 526-27 (5th Cir.), cert. denied, 439 U.S. 849 (1978).

United States v. Villegas, 899 F.2d 1324, 1341 (2d Cir.), cert. denied, 498 U.S. 991 (1990).

While no attempt was made here to address the factors in this test, it must be noted that in the instant case, as in Villegas, the voluminous government records, including hundreds of taped conversations, as well as defendant's extensive and well-chronicled criminal past, make it possible for counsel to reconstruct defendant's relevant conduct and criminal history for sentencing classification purposes. Likewise, this court is persuaded that the case against defendant is strong. This judgment is buttressed by the fact that the jury deliberated and returned nine guilty verdicts in only three hours.

In sum, even if defendant had total memory loss concerning his criminal history and the events surrounding the crime, a finding of incompetence is not mandatory. In fact, under the circumstances prevailing in the instant

cause, such a finding is contraindicated under the relevant standard. Moreover, unlike a total amnesiac who has no recollection, the record indicates that the defendant does have some considerable recollection which could prompt defense counsel to make inquiries which no doubt would lead to additional information.

Dr. Denney's testimony poses some difficulty in analysis. To the extent that his opinions relating to defendant's ability to assist counsel are at least in part derivative of information contained in the partisan affidavits filed by defendant's family and friends, this courts must view such opinions with caution. To the extent that his opinions rest on inaccurate assumptions about the applicable legal standards for competency, this court must reject them. And in any case, Dr. Denney's opinion must be considered in light of material variations between his opinion and the opinion rendered by Dr. Bertschinger.

Before moving on to Dr. Bertschinger, it is appropriate to briefly discuss the report and testimony of Dr. deLeon, the psychiatrist retained by defendant. While it appeared that Dr. deLeon carefully and professionally examined the defendant for one hour, it is also apparent that his opinion primarily rests on written sources which were available and on interviews with members of the defendant's family. Dr deLeon apparently placed great emphasis on Dr. Denney's

report. In fact, Dr. deLeon wrote:

> I would like to comment that Dr. Denney's forensic report is one of the most excellent, complete and thorough such reports I have ever seen. In fact, my experience over the years with Federal Agencies has long since cause me to regard the medical and psychological/psychiatric personnel at the Springfield Barracks as real models of thoroughness, competency and objectivity.

(deLeon rep. at 2.) In light of the fact that Dr. Denney's testimony was significantly different than his written report, Dr. deLeon's overwhelming reliance on the report must be questioned.

As previously discussed with reference to the Giulianis, this court is concerned about reliance on the partisan statements made by defendant's friends and family. The court is also concerned, on the basis of Dr. deLeon's testimony, that he was predisposed to find irregularities that did not exist. For example, Dr. deLeon found it highly unusual that defendant felt that he was the target of a 'federal vendetta' and that he was convicted for doing nothing more than 'talking on the phone' with his friends. To the contrary, not only is this reaction from the defendant unsurprising, it is in fact exactly the theme advanced by his attorneys throughout the pretrial and trial proceedings. What Dr. deLeon mistook for confusion and insensibility was actually the defense urged by defendant's competent

criminal defense attorneys under the facts and circumstances of the case.

In sum, in those areas in which the court found Dr. deLeon credible, his testimony is cumulative with the testimony of Dr. Denney. Accordingly, we shall compare that opinion to the opinion of Dr. Bertschinger.

In comparing the reports and testimony of Drs. Denney and deLeon with that of Dr. Bertschinger, it is necessary, as a preliminary matter, to discuss the different approaches taken by the witnesses. Drs. Denney and deLeon assessed defendant's mental capacity and rendered a judgment as to whether or not the defendant could perform certain tasks up to a minimum level of legal competency. This intellectual process involves three distinct analytical steps: first, determination of the defendant's mental capabilities; second, determination of the legal standard of competency; and third, comparison of defendant's capabilities to the standard. As previously discussed, these witnesses on occasion seemed motivated by the question put by counsel concerning his view of the legal competency standard, thereby reducing the utility of their opinions as their testimony focussed on erroneously premised questions of ultimate fact.

Dr. Bertschinger's testimony was markedly different; he refused to stray beyond his expertise. The doctor explained that it was his understanding that the court, as law finder,

would determine what level constituted legal competency and that the court, as fact finder, would compare the defendant's capabilities to the legal standard and make the competency determination. Accordingly, the opinions rendered by Dr. Bertschinger are not tainted by the notions of legal competency conveyed by anyone to the other experts. This fact, in and of itself, makes the testimony of Dr. Bertschinger more credible and useful to the court.

Dr. Bertschinger concurred in the observation of the other two doctors that defendant appeared to suffer from an Alzheimer-type dementia. However, Dr. Bertschinger believes that such a diagnosis is still premature. Alzheimer's Disease is diagnosed pre-mortem through elimination of other possible causes of the observed symptoms. The diagnosis is only confirmable post-mortem, through an autopsy. According to Dr. Bertschinger, there is growing evidence that a significant number of people labelled with irreversible Alzheimer's Disease in fact have treatable depression-induced dementia. Therefore, while Dr. Bertschinger confirmed the general content of the other doctor's observations, he was, based on the record before him, unwilling to commit to a definitive Alzheimer's diagnosis.

In part, the witness's view must be conditioned on his knowledge that the diagnosis of Alzheimer's Disease is often

times erroneous. It falls to the court to recognize that though all three capable experts have suggested an Alzheimer's Disease diagnosis in this case, the strong possibility is that the diagnosis is wrong and the proper diagnosis could well be something completely different. No evidence was admitted which tended to show how often a pre-mortem diagnosis of Alzheimer's Disease is proven to be correct after the patient's death.

Ultimately, the specific diagnosis is not determinative of the instant issue because, regardless of whether defendant suffers from Alzheimer's Disease or depression, we are here concerned about his present capacity, due to whatever mental disease or defect.

Dr. Bertschinger did not receive the affidavits which accompanied defendant to Springfield and Dr. deLeon. Dr. Bertschinger also did not see the Presentence Report. Nor did he consult with the attorneys. He did review transcripts of some of the logger tapes shortly before he testified but after he submitted his written report. In short, what he knew about the substantive case against the defendant came from his interview with the defendant and some cryptic remarks in Dr. Denney's report. These circumstances provide an ideal context in which to assess whether defendant understands the case against him and its consequences.

Defendant reportedly told Dr. Bertschinger about the pressure the government put on Robert Biondolillo, arguably the most critical witness to the prosecution. The defendant also discussed specific damaging comments from the interview room tapes, such as when someone said to defendant, "Anthony, you're still the boss." Defendant also remembered the tape in which a visitor mentioned dope and the defendant allegedly jumped up and told him to leave and not come back because he did not like and did not want to have anything to do with drugs. In protesting that he was innocent, defendant even explained that he could not be guilty because he never had $1,000.00. The latter statement indicates that he retained at least a rudimentary recollection of the $1,000.00 requirement under the Taft-Hartley charges.

Defendant talked about his past, including his 1937 murder conviction, using what Dr. Bertschinger described as self-protective language. For example, defendant recounted that he was not the person who actually killed pulled the trigger but rather was just an 'aider and abettor' because he drove the car. Defendant also told Dr. Bertschinger that he subsequently received two pardons. (In fact, his sentence was first commuted and then he received a pardon from the governor.) With respect to his previous R.I.C.O. conviction, defendant denied that he was

guilty because at the time the crime was committed, he was in Philadelphia.

Defendant was able to recount, with varying degrees of specificity, his past employment. His greatest difficulty came in recounting his experience on the Northeast Ohio Regional Sewer District board. Nonetheless, he remembered that he had been placed on a board by the City of Cleveland as some kind of honor. Given the quantity of records the government has retained on defendant, as well as the public nature of such an act, it would not be difficult for counsel to reconstruct details like this from his past, when his recollections are vague.

Asked about the right of allocution, Dr. Bertschinger indicated that if it meant that defendant had to be an orator, he was probably incompetent but that the defendant would probably be capable of making "a broad statement of the goods things he's done."

Dr. Bertschinger readily conceded that the defendant is significantly impaired. However, it is also clear that his medical diagnosis of significant impairment is not equivalent to a legal finding of incompetency. Dr. Bertschinger testified that with patience and diligence, defendant could probably interact with counsel and assist them by providing information as well as making broad decisions relating to his defense. While the defendant could

probably never master the details and subtleties of the Sentencing Guidelines, he is not required to do so.

The questions posed by defense counsel and the arguments contained in his brief tent to understate the question of degree or severity. Mere diagnosis of a mental disease or defect, especially ones like Alzheimer's or depression, does not dictate a finding of incompetency. The diagnosis is the starting point, not the endpoint.

Of the three experts who testified, Dr. Bertschinger demonstrated the most sophisticated appreciation of his role in this context. Additionally, Dr. Bertschinger exhibited the most sophisticated analysis of defendant's condition and its potential cause. Dr. Bertschinger also examined the defendant in the most objective manner. His opinion and testimony appeared least susceptible to influence from the partisan bias of the defendant's friends and family. For these reasons, and in light of the difficulties encountered with the other experts' opinions, this court finds the opinion of Dr. Bertschinger the most credible.

III

The last evidence which merits discussion is the logger tapes. As Strickland counsels, this court should take into account lay testimony corroborating and refuting the expert's opinions. The conversations are mainly between the defendant and his ex-wife and sons. In substance, the

conversations are personal. Certain tapes, considered alone and in a light unfavorable to the defendant suggest that he may have been exaggerating his condition to the doctors at Springfield.

Although Dr. Denney concedes this, he testified that the tapes are also susceptible to more innocent explanations. Nonetheless, the doctor testified that the tapes were consistent with his diagnosis to the extent that they displayed the same kinds of fluctuating periods of confusion and lucidity which he observed during his interviews. The tapes are meaningful, therefore, because they afford this court a first hand opportunity to observe the kind of confusion which forms the root of his concern.

Taken as a whole, the tapes support a finding of competency. While the tapes do include periods during which the defendant was apparently confused, assuming that the confusion was caused by his mental condition and not external factors such as his hearing difficulty or the extreme background noise sometimes present,[4] the people with whom he spoke were able to work out what he was

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[4] In defendant's very first conversation, and in subsequent conversation, defendant indicated that he did not have his hearing aid and that his ex-wife would need to bring his spare when he was moved from Springfield back to Ohio. Most of the conversations reflect loud public address announcements and conversations in the background.

trying to communicate by asking him questions and giving him prompts. Defendant was not reluctant, in those instances, to tell his family when their questions were misleading. These conversations are consistent with Dr. Bertschinger's testimony that defendant will be able to work with counsel as long as counsel is reasonably patient and diligent.

Some of the conversations also reflect on defendant's perception of the case against him. For example, he talked about the fact that many of the witnesses testified "without backup." In fact, there was very little evidence to support the testimony of individuals like Ron Fino who provided evidence relating to the racketeering enterprise. Defendant also acknowledged the fact that Larry Dean Dusenberry did not testify for defendant at his trial because Dusenberry still had proceedings pending in his own prosecution. Defendant indicated that he and his attorney had discussed the possibility of talking to Dusenberry in light of a recent Sixth Circuit order striking Dusenberry's guilty plea. Defendant said that he gave his attorney permission to contact Dusenberry.

Defendant's conversations also reflect the fact that he realized that a mental impairment could result in his being released. In fact, defendant told his ex-wife that his current attorney said, "You should be sick as hell. Then they can't

send you anywhere." The tone of defendant's conversations after he discussed his mental condition with the doctors at Springfield at which time his memory problem was apparently described to him, indicate a marked improvement in mood. Finally, the defendant frequently reflected that he was sensitive to the fact that his conversations were being monitored by the F.B.I.

The contents of the logger tapes are consistent with a finding that the defendant has sufficient present mental capacity to understand the nature of consequences of his sentencing. The conversations also reflect that defendant understood that if he has a mental defect he can not be sentenced. In addition, the conversations indicate a working memory of his trial and the significance of certain events at the trial. And while this court does not question the experts' belief that defendant has suffered a decrease in his short term memory, the lapses evidenced by the tapes, while occasionally conspicuous, confirm Dr. Bertschinger's belief that they are not of such a degree to render the defendant legally incompetent.

Based on the testimony of Dr. Bertschinger and the logger tapes, this court finds that the defendant understands what is currently at stake. The defendant is capable of providing meaningful assistance to his attorneys to the extent called for at sentencing. Specifically, defendant can

assist his attorneys in formulating a response to the historical assertions of the Presentence Report. Defendant has self-protective recollection of his past criminal record and the defendant has usable memories of past good things which he has done. Likewise, to the extent necessary for sentencing, defendant certainly has sufficient recollection of the trial and some of the major issues raised therein to provide reasonable, rational assistance to his attorneys with respect to issues like relevant conduct. While the experts agreed that defendant has some impairment of his ability to think abstractly, decisions such as whether to attempt to accept responsibility are not so complex that the impairment described by Dr. Bertschinger and evidenced on the tapes would prevent defendant from reaching an informed, voluntary decision given the assistance of counsel.

Lastly, with respect to exercising his right to allocution, the court is confident that defendant, should he choose to do so, is well able to speak on his own behalf. Both Dr. Bertschinger and deLeon described an individual who continues to subscribe to the belief that he is an innocent man who has tried to do good throughout his life but is thwarted by a government vendetta. The conversations reported by the experts indicate that the defendant remains convinced of his innocence and the value of the things he has done for the community.

The mere fact that the defendant sometimes has to pause to find the correct work or uses words which convey his thoughts though they are not in a technical sense grammatically correct does not render him incompetent. If the defendant would be better served by reading his statement aloud or submitting a written statement to be considered by the court in lieu of, or in addition to, an oral statement, allowances will certainly be made. A defendant's reading of some statement at the time of sentencing is not unusual. Just as this court would not deprive a person who stutters or fears speaking in a public setting the opportunity to communicate on their own behalf, all reasonable accommodations will be made to maximize defendant's opportunity to articulate why this court should be lenient. But the fact that reasonable accommodations may be advisable or that the content of the ultimate statement may not be as moving or articulate as counsel might hope does not render further proceedings constitutionally impermissible.

It is this court's opinion, based on the testimony of Dr. Bertschinger and the content of the tapes, that this defendant is capable of speaking on his own behalf at sentencing.

In conclusion, this court accepts the opinion of the medical experts that defendant can understand the nature

and consequences of the proceedings he now faces. This court further finds, consistent with the testimony of Dr. Bertschinger, the logger tapes and the courts own observation of the defendant, that he is capable of rationally assisting counsel for purposes of preparing for his sentencing. Also, this court finds that defendant has sufficient present mental capacity to exercise his right of allocution and make basic decisions about his defense. Accordingly, defendant's motion is DENIED. The defendant shall be sentenced on March 21, 1994 at 9:00 a.m.

IT IS SO ORDERED.

/s/ Samuel Bell
SAM H. BELL
U. S. DISTRICT JUDGE

CONSTITUTION OF THE UNITED STATES

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

18 U.S.C. § 4241
PROVIDES IN PERTINENT PART:

(a) Motion to determine competency of defendant.– At any time after the commencement of a prosecution for an offense and prior to the sentencing of the defendant, the defendant or the attorney for the Government may file a motion for a hearing to determine the mental competency of the defendant. The court shall grant the motion, or shall order such a hearing on its own motion, if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.

(b) Psychiatric or psychological examination and report.–Prior to the date of the hearing, the court may order that a psychiatric or psychological examination of the defendant be conducted and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247 (b) and (c).

(c) Hearing.–The hearing shall be conducted pursuant to the provisions of section 4247(d).

(d) Determination and disposition.–If, after the hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental

disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for treatment in a suitable facility--

(1) for such a reasonable period of time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the trial to proceed; and

(2) for an additional reasonable period of time until--

(A) his mental condition is so improved that trial may proceed, if the court finds that there is a substantial probability that within such additional period of time he will attain the capacity to permit the trial to proceed; or

(B) the pending charges against him are disposed of according to law;

whichever is earlier.

If, at the end of the time period specified, it is determined that the defendant's mental condition has not so improved

as to permit the trial to proceed, the defendant is subject to the provisions of section 4246.

* * * *

18 U.S.C. § 4246
PROVIDES IN PERTINENT PART:

(a) Institution of proceeding.--If the director of a facility in which a person is hospitalized certifies that a person whose sentence is about to expire, or who have been committed to the custody of the Attorney General pursuant to section 4242(d), or against whom all criminal charges have been dismissed solely for reasons related to the mental condition of the person, is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another, and that suitable arrangements for State custody and care of the person are not available, he shall transmit the certificate to the clerk of the court for the district in which the person is confined. The clerk shall send a copy of the certificate to the person, and to the attorney for the Government, and, if the person was committed pursuant to section 4241(d), to the clerk of the court that ordered the commitment. The court shall order a hearing to determine whether the person is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another. A certificate filed under this subsection shall stay the release of the person pending completion of procedures

contained in this section.

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18 U.S.C. § 4247
PROVIDES IN PERTINENT PART:

* * * *

(b) **Psychiatric or psychological examination.**– A psychiatric or psychological examination ordered pursuant to this chapter shall be conducted by a licenses or certified psychiatrist or psychologist, or, if the court finds it appropriate, by more than one such examiner. Each examiner shall be designated by the court, except that if the examination is ordered under section 4245 or 4246, upon the request of the defendant an additional examiner may be selected by the defendant. For the purposes of an examination pursuant to an order under section 4241, 4244, or 4245, the court may commit the person to be examined for a reasonable period, but not to exceed thirty days, and under section 4242, 4243, or 4246, for a reasonable period, but not to exceed forty-five days, to the custody of the Attorney General for placement in a suitable facility. Unless impracticable, the psychiatric or psychological examination shall be conducted in the suitable facility closest to the court. The director of the facility may apply for a reasonable extension, but not to exceed fifteen days under section 4241, 4244, or 4245, and not to exceed thirty days under section 4242, 4243, or 4246, upon a showing of good cause that the additional time is necessary to observe and evaluate the

defendant.

(c) Psychiatric or psychological reports.--A psychiatric or psychological report ordered pursuant to this chapter shall be prepared by the examiner designated to conduct the psychiatric or psychological examination, shall be filed with the court with copies provided to the counsel for the person examined and to the attorney for the Government, and shall include--

(1) the person's history and present symptoms;

(2) a description of the psychiatric, psychological, and medical tests that were employed and their results;

(3) the examiner's findings; and

(4) the examiner's opinions as to diagnosis, prognosis, and--

(A) if the examination is ordered under section 4241, whether the person is suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense;

* * * *